Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1998

FORT BEND COUNTY, TEXAS,
Petitioner,

v.

KENNETH CRAIG BRADY, et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents sued Fort Bend County, Texas under 42 U.S.C. § 1983 and the First Amendment claiming that a newly elected sheriff did not reappoint them as deputies because they supported the sheriff's opponent during the election. The questions presented are:

1. Whether the Fifth Circuit erred in disagreeing with another circuit and holding that a county is vicariously liable, under *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), and § 1983, for a newly elected sheriff's decision to not appoint deputies where, as in Texas and at least ten other states, the county itself is statutorily prohibited from participating in, approving or disapproving of, or countermanding, those decisions.

2. Considering that state law provides that a deputy's term of office expires automatically with the term of the deputy's appointing sheriff, and that the new sheriff is statutorily required to make new appointments at the beginning of each term, whether the Fifth Circuit erroneously departed from the rule in at least four other circuits that deputy sheriffs are exempt from First Amendment protection with respect to a new sheriff's decision to not appoint them.

LIST OF PARTIES

1. Fort Bend County, Texas, Petitioner
2. Kenneth Craig Brady, Respondent
3. Bobby Lee Evans, Respondent
4. William E. Fortenberry, Respondent
5. James Arthur Leach, Respondent
6. Stephan Leon Skinner, Respondent
7. Guy "Nubbin" Chamblee, Respondent
8. Antonio O. Rosas, Respondent

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1. *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995) (*Brady I*).

2. *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998) (*Brady II*).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 2, 1998. Fort Bend County filed a suggestion for rehearing en banc and the Fifth Circuit, treating the suggestion as a petition for panel rehearing, denied the petition for panel rehearing and the suggestion for rehearing en banc on August 18, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Due to the length of the relevant constitutional and statutory provisions, they are set forth in the appendix.

STATEMENT

Factual Background.

In January 1992, R. George Molina was an elected Fort Bend County Justice of the Peace. He decided to run for the office of sheriff against then incumbent, Sheriff Perry Hillegeist. All Respondents supported Hillegeist's campaign though the level of involvement of each Respondent varied from very active (Brady) to almost no activity (Skinner).

By state statute, deputy sheriffs serve "at the pleasure of the sheriff." TEX. LOC. GOV'T CODE ANN. § 85.003(c).

A deputy's tenure expires automatically with the term of his or her appointing sheriff. *E.g.*, *Abbott v. Pollock*, 946 S.W.2d 513, 516-18 (Tex. App.—Austin 1997, writ denied). An incoming sheriff is under no duty to reappoint any deputy. *Williams v. Bagley*, 875 S.W.2d 808, 811 (Tex. App.—Beaumont 1994, no writ). Additionally, state law deems a sheriff legally responsible for the official acts of his or her appointed deputies; thus, deputies are "alter egos" of the sheriff. *See* TEX. LOC. GOV'T CODE ANN. § 85.003(d); *El Paso County Sheriffs Deputy's Assoc., Inc. v. Samaniego*, 802 S.W.2d 727, 728 (Tex. App.—El Paso 1990, writ denied); *County of El Paso v. Hill*, 754 S.W.2d 267, 268 (Tex. App.—El Paso 1988, writ denied).

Molina won the election in November, 1992, and was sworn in January 1, 1993. Because Sheriff Hillegeist was not re-elected, Respondents' terms of office automatically expired by operation of state law on December 31, 1992. Molina's chosen deputies were sworn in January 1, 1993. Molina did not reappoint Respondents.

Although he was not required to do so, Molina appointed a transition team. The transition team met on at least two occasions. The first meeting was November 4, 1992, and the second was approximately December 1 or 2, 1992. Molina made his final hiring decisions by approximately December 2, 1992. On December 4, 1992, he delivered written notices to each Respondent that he would not have a position for them in his department. Molina's secretary, prepared a form letter in the latter part of November 1992 but then added the names of the specific people Molina decided would not be rehired on December 3, 1992.

At no time did any Respondents approach the county commissioners to seek reassignment within the county to another position.

Proceedings Below.

Respondents Brady, Chamblee, Evans, Fortenberry, Leach, Skinner, and Plaintiff John Font,[1] filed their original complaint in the United States District Court for the Southern District of Texas, Houston Division, against Fort Bend County and R. George Molina, individually, and in his official capacity as sheriff, alleging, *inter alia*, a § 1983 claim for alleged violations of their First Amendment rights (Civil Action No. H-93-0441) (the "Brady" case). Both Fort Bend County and Molina, individually, filed motions for summary judgment. U.S. Magistrate Judge Nancy Pecht recommended denial of defendants' motions, a recommendation U.S. District Judge Simeon T. Lake adopted. The motion for summary judgment on Molina's behalf was based on qualified immunity. Molina, in his individual capacity, appealed.

While the "Brady" case was pending on appeal, Respondent Antonio Rosas, represented by the same counsel as the "Brady" plaintiffs, filed a separate action against the same defendants in the same district and division (Civil Action No. H-94-2485) (the "Rosas" case). Molina filed a motion to dismiss on qualified immunity grounds which U.S. District Judge Vanessa Gilmore denied. Molina, again in his individual capacity, perfected an appeal.

On July 13, 1995, a panel of the Fifth Circuit concluded that denial of Molina's motion for summary judgment in the "Brady" case was correct and dismissed the appeal because the law in the Fifth Circuit was settled that "a public employee cannot be terminated for exercise of his First Amendment rights unless the sheriff alleges a 'disruption of governmental functions.'" *Brady I*, 58 F.3d

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[1] John Font was originally a plaintiff in the trial court, and is a party to the trial court judgment. He was not a party to the appeal in the Court of Appeals, and is not a party in this Court.

at 176 (App. 68a). In so doing, however, Judge Edith Jones expressly noted the Seventh Circuit's contrary rule which authorizes political considerations when a sheriff determines the qualifications for the position of deputy. *Id.* at 174 (citing *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992)). Moreover, Judge Jones emphasized the Seventh Circuit's conclusion that a sheriff could not have had a clear understanding that deputy sheriffs had any constitutional protection from a politically based discharge. *Id.*(App. 65a) After citing other circuits which have followed the Seventh Circuit, specifically, the Sixth and Eleventh, Judge Jones then called upon the full court to revisit the question of whether partisan affiliation or political activity can ever be proper factors in a personnel decision regarding deputy sheriffs. *Id.* at 176.(App.68a) Additionally, the court noted that Fifth Circuit law was in tension with Texas state law which allows a sheriff unfettered discretion in appointing deputies. Simply put, the Fifth Circuit recognized the split in authority as to whether political considerations are appropriate for a sheriff's decision to appoint deputies. Shortly thereafter, the Court of Appeals granted Molina's suggestion for rehearing en banc. *Id.*(app. 69a)

The Fifth Circuit's order granting rehearing en banc was quickly followed by motions to dismiss Molina in his individual capacity in the both the "Brady" and "Rosas" cases. In the motions, Respondents specifically referenced the Court of Appeals's granting of en banc review as a reason for dismissing Molina. Judge Gilmore and Judge Lake entered separate orders dismissing Respondents' claims against Molina individually. Subsequently, at Respondents' request, the Fifth Circuit dismissed both the "Brady" and "Rosas" appeals as moot.

Judge Lake entered an order consolidating the "Brady" and "Rosas" cases, and the consolidated case went to trial on Respondents' § 1983 claim against Fort Bend

County only. Trial began on June 3, 1996, and the jury returned a verdict sixteen days later, finding in favor of all plaintiffs except John Font. The jury found that Molina's failure to re-hire the Respondents was based on their campaign efforts and found that the County had violated the First Amendment. Thus, the county presumes, for the purposes of this petition, that Molina did not appoint Respondents because they did not support his election efforts or because they campaigned against him. Fort Bend County moved for judgment as a matter of law at the close of the plaintiffs' case and at the close of evidence, and renewed its Rule 50 motion post-verdict. The court entered a final judgment on August 15, 1996 requiring Fort Bend County to pay Respondents the damage amounts awarded by the jury, with the exception of certain mental anguish awards on which the court granted judgment as a matter of law in the County's favor.

Fort Bend County appealed and Respondents-cross-appealed. Among other things, Fort Bend County argued that it could not be liable under § 1983 because Molina is not a "final policymaker" for the county with respect to county employment policy, and that the county was not the "moving force" behind Molina's hiring decisions as to these deputies. Fort Bend County also argued that Texas sheriffs are exempt from limitations on their hiring decisions relating to political campaigning and that the law in the Fifth Circuit conflicts with numerous other circuits which have decided the issue, namely the Fourth, Sixth, Seventh, and Eleventh Circuits.

The Fifth Circuit affirmed the judgment against the county and also rejected Respondents' cross-appeal. *Brady II*, 145 F.3d at 691 (App. 4a). It observed, as the County has argued, that the sheriff is empowered by the Texas Legislature with sole authority and discretion to appoint deputies. Additionally, the Court acknowledged that state law vests the Commissioners Court with authority over matters of county employment policy. *Id.* at 699 (App. 10a)

(citing TEX. LOCAL GOV'T CODE ANN. §§ 151.001, 152.002, 152.071).

Relying upon *McMillian v. Monroe County*, ___ U.S. ___, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1 (1997), the court first noted that in determining whether Molina constituted a policymaker for the county, the relevant inquiry is not whether he acted for the county in some categorical, all or nothing manner. Rather, courts are to "ask whether governmental officials are final policymakers for the local government *in a particular area, or on a particular issue.*" *Brady II*, 145 F.3d. at 699 (App. 10a-11a). The Fifth Circuit characterized the "area" in question as "filing available employment positions in the sheriff's department." *Id.* The court then distinguished Molina from the hypothetical sheriff discussed in *Pembaur* by noting that a Texas sheriff is not merely granted discretion to hire and fire employees by the commissioner's court, but that the Texas Legislature has vested sheriffs with such discretion, and the sheriff's exercise of their discretion is unreviewable by any other official or governmental body in the county. *Id.* at 700 (App. 12a). The court reasoned that because a sheriff is vested with the final say so in choosing his or her deputies, he or she necessarily binds the county even though, as the court acknowledged, the county gives the sheriff no power whatsoever and cannot intervene in the sheriff's decision. Specifically, the court held that "the fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area." *Id.* at 702 (App. 16a).

The court stated that "[t]he county argues, however, that the commissioner's court possesses an indirect ability to control the sheriff's exercise of discretion to hire and fire deputies because it determines the number of deputy positions that the sheriff will be allowed to fill." *Id.* at 700 (App.

13a).[2] In addressing this argument, the court referenced *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), for the proposition that "indirect constraint" by a municipality over a decisionmaker does not indicate that the official in question does not possess the final policymaking authority. *Jett* dealt with the claim of a coach under §§ 1981 and 1983 that his transfer from a coaching position violated his constitutional rights to due process and equal protection. *Jett*, 491 U.S. at 707. This Court remanded *Jett* for a determination of whether DISD's superintendent wielded the final policymaking authority concerning the transfer of school district personnel. *Id.* at 738. Here, the Fifth Circuit interpreted *Jett* to mean that "[t]o the extent that final policymaking authority regarding the hiring and firing of school district personnel was vested in an official other than the superintendent, that other official could certainly "constrain" the superintendent's exercise of authority to transfer school district personnel by simply firing the individuals the superintendent wished to transfer." *Brady II*, 145 F.3d at 701 (App. 14a). According to the Fifth Circuit, "[t]his is precisely the sort of indirect constraint that the commissioner's court can place upon the sheriff's exercise of his authority to hire and fire deputies." *Id.*

In rejecting the County's arguments, the court added the following comment in a footnote: "[t]he County does not contend that it is not liable for the sheriff's unconstitutional employment practices on the ground that, under Texas law, sheriffs act as state policymakers as opposed to county policymakers in filling available deputy positions. *See McMillian*, 117 S.Ct. at 1740 . . . We therefore do not address this issue." *Id.* at 702 n. 4 (App. 16a). As discussed *infra*, this statement also misconstrues the County's argument.

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[2] This portion of the Court of Appeals' opinion misinterprets the County's argument, as discussed *infra*, pp. 21-22.

The Court of Appeals also overruled the County's argument that these Respondents are not entitled to First Amendment protection. The opinion noted this Court's jurisprudence that the First Amendment forbids governmental officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. *Id.* at 702 (App. 17a) (citing *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976)). The court rejected the County's argument that a newly elected sheriff's decision to "not rehire" a deputy is distinguishable from "discharging" a deputy because state law provides that a deputy's term of office expires with that of the sheriff and a newly elected sheriff has full authority to choose whom he or she wishes to fill deputy positions. The County argued that the Fifth Circuit's refusal to recognize such a distinction nullifies state law. The court ultimately held that Molina's failure to rehire Respondents, if based upon their political activities in support of Sheriff Hillegeist's campaign, constituted a violation of the First Amendment. *Id.* at 705 (App. 16a-36a). In reaching this conclusion, however, the court failed to discuss any of the on-point and directly conflicting cases from other circuits — cases the Fifth Circuit had previously recognized in its decision during the interlocutory appeal.

The county filed a suggestion for rehearing en banc, which was denied. The Court of Appeals treated the suggestion as a petition for panel rehearing, and denied the petition as well.

ARGUMENT

REASONS FOR GRANTING THE PETITION

I. IN IMPOSING LIABILITY ON A COUNTY FOR A SHERIFF'S UNCONSTITUTIONAL FAILURE TO REAPPOINT DEPUTIES, THE DECISION BELOW HAS CREATED A CONFLICT IN THE CIRCUITS AND HAS MISAPPLIED THIS COURT'S DECISIONS IN AN IMPORTANT AND RECURRING AREA OF THE LAW.

In at least eleven states, county sheriffs have the sole authority to appoint their deputies. Such authority does not necessarily mean, however, that such sheriffs set county employment policy and are therefore final policymakers for the purpose of giving rise to a county's liability. The Fourth Circuit, when facing the same facts and legal question that are at issue here, held that the employment decisions of sheriffs and others with final hiring authority did not give rise to municipal liability. The Fifth Circuit's decision here squarely conflicts with that view, as well as with on-point decisions of this Court. *Certiorari* is warranted to address the circuit split and clarify this important and far-ranging issue of municipal liability.

A. The decision below conflicts with decisions of the Fourth Circuit.

The Fifth Circuit held that a county is liable for a sheriff's unconstitutional[3] appointment decisions because the

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[3] For purposes of the county's first question presented, the county assumes that Molina's decision to not reappoint Respondents was unconstitutional. However, the county does not waive its alternative argument, in connection with the second question presented, that the First

sheriff has the final say so with respect to who is selected as a deputy, and thus, the sheriff necessarily is a "final policymaker" for the county. This result conflicts with other courts which have squarely addressed whether appointment authority vested in a particular official can bind the municipality. For instance, in *Greensborough Prof. Fire Fighter's Assoc. v. City of Greensborough*, 64 F.3d 962, 965-66 (4th Cir. 1995), the Fourth Circuit declined to hold the municipality liable for a fire chief's hiring decisions when his discretionary authority extended no further than the ability to hire within the fire department. In *Greensborough*, as here, the decisionmaker's power is one of final selection, not one of employment policy making for the municipality.

Similarly, in *Harter v. Vernon*, 953 F.Supp. 685, 692-93 (M.D.N.C. 1996) *aff'd*, 101 F.3d 334 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2511, 138 L. Ed. 2d 1014 (1997), the court granted summary judgment in favor of Rockingham County, North Carolina, against claims brought by former deputies who alleged that the sheriff terminated them in retaliation for their failure to support his reelection campaign. The court analyzed North Carolina's applicable statutory provisions. Similar to Texas law, North Carolina grants the sheriff final authority to appoint deputies. *Harter*, 953 F.Supp. at 692 (citing N.C. Gen. Stat. § 153 A-103). As in Texas, the county board of commissioners in North Carolina cannot control or review the sheriff's hiring decisions. *Id.* at 693. The court concluded that "a sheriff has final policymaking authority in employment decisions, but he does not exercise that authority on behalf of the county." *Id.* This is precisely why Respondents' claim against Fort Bend County fails. *See also Olivo v. Mapp*, 838 F.Supp. 259 (E.D. Va. 1993) (granting summary judgment and holding Virginia municipality not liable under § 1983 for

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Amendment does not preclude Molina's decision to not appoint them.

personnel decisions of sheriff based upon similar facts and legal reasoning).[4]

B. The question presented is of enduring national importance because at least ten other state legislatures have granted sheriffs similar authority in the hiring of deputies.

Like Texas, other state legislatures have vested sheriffs with sole decision making authority as to the selection of deputies. *See* COLO. REV. STAT. § 30-10-506 (1997); KY. REV. STAT. ANN. §70.030(1) (Michie, 1996); MICH. COMP. LAWS § 51.70 (1998); MISS. CODE ANN. § 19-25-19 (1997); MONT. CODE ANN. § 7-32-2102(1) (1997); N.M. STAT. ANN. § 4-41-5 (Michie, 1998); N.J. STAT. § 40A: 9-117.2 (1998); N.C. GEN. STAT. § 153A-103(2) (1967); OKLA STAT. tit. 19 § 547(A) (1997); OR. REV. STAT. § 204.635(1)A (1997); S.C. CODE ANN. § 23-13-10 (1997). Therefore, the County's argument raises a matter of national concern.

Respondents seek to hold the county liable every time the sheriff makes an unconstitutional hiring decision. Such a position, as noted previously, only fosters recurring lawsuits by disgruntled deputies who know their jobs are only temporary in the first place.[5] This question is of compelling importance because to allow the Court of Appeals decision to stand would subject cities and counties to

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[4] Indeed, the instant result conflicts with at least one prior decision of the Fifth Circuit. *Gunaca v. State of Texas*, 65 F.3d 467, 473 n. 5 (5th Cir. 1995) (rejecting municipal liability when exclusive authority to hire and fire investigators rested with district attorney), as well as Texas state law. *See, e.g., Williams v. Bagley*, 875 S.W.2d 808 (Tex.App.—Beaumont 1994, no writ).

[5] Each Respondent testified that they were well aware that their positions were subject to the pleasure of the sheriff.

litigation and liability exposure and the potential for money damages every four years if the newly elected sheriff does not keep every single deputy; and the claimants need not even sue the sheriff directly. Counties will be helpless to prevent this scenario because they cannot interfere with the sheriff's appointment decisions. Moreover, liability exposure does not end merely with a sheriff's appointments. Typically, counties employ numerous elected officials, including the county clerk, district clerk, district attorney, and so forth. These elected officers also have the statutory right to fill available positions, and their decisions will, according to the Fifth Circuit, bind the municipality as well.

C. The decision below misapplies basic principles of municipal liability established by this Court.

1. *This Court's decisions in* Monell, Pembaur, *and* Praprotnik *clearly establish that a county may not be held responsible under § 1983 for an act over which it has no control.*

The Court of Appeals's reasoning and conclusion is fundamentally at odds with the principles articulated in *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), and its progeny. In *Monell*, this Court considered whether municipal units are "persons" within the meaning of 42 U.S.C. § 1983. *Monell*, 436 U.S. at 662. After an exhaustive examination of the legislative history of § 1983, the Court determined that a municipal unit, because it is a corporation, is a "person" under § 1983 and may be held liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or "for constitutional deprivations visited pursuant to governmental 'custom' even though such

a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91.[6]

However, the Court emphasized that a municipality cannot be held liable under § 1983 based on a *respondeat superior* theory. *Id.* at 691. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. The fundamental underpinning of *Monell* is that municipal liability must necessarily be based upon the *municipality's* act.

Since *Monell*, this Court has often addressed the limits of municipal liability. In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Court examined whether, and in what circumstances, a decision by a municipal policymaker on a single occasion gives rise to municipal liability. *Pembaur* reemphasized that only the acts of the municipality itself can subject it to § 1983 liability. After concluding that liability may be imposed for a single decision by municipal policymakers under appropriate circumstances, the Court outlined a circumstance which describes the instant case precisely:

> Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. [footnote omitted]. *The fact that a particular official—even a policymaking official—has discretion*

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[6] Initially, Respondents took the position that county liability would lie because official county policy or custom inflicted the harm, and they alleged as much in their original complaint. However, the amended complaint discarded that allegation, thus Respondents presented no evidence at trial that Molina based his appointment decisions on an official county policy or custom.

> *in the exercise of particular functions, does not, without more, give rise to municipal liability based on an exercise of that discretion.* [citation and footnote omitted]. *The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.*[12]
>
> [12] Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. . . .

Pembaur, 475 U.S. at 484 n. 12 (emphasis added).

Two terms later, in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Court found that a city employee who was laid off or transferred for allegedly exercising his First Amendment rights did not establish that the "appointing authorities" were municipal policymakers.[7] The Court restated several principles that serve as guidelines as to whether a decision on a single occasion may be enough to establish an unconstitutional municipal policy. *Id.* at 123. Two of those principles bear particular relevance here: (1) "only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability," and (2) "the challenged action must have

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[7] In *Praprotnik*, the jury exonerated the three individual defendants, but found liability against the city.

been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *Id.* Application of these factors indicates the need for this Court to grant *certiorari* to correct the error below and align the circuits. Indeed, the hypothetical outlined by the Court in *Pembaur is* Fort Bend County's case. Molina is not a final policymaker for the county on matters of employment policy, and his decisions regarding the appointment of deputies are not the county's acts.

2. *The State of Texas has granted sole control over the hiring of deputies to sheriffs. Thus, the sheriff is not acting for the county when making deputy appointments.*

The decision below also ignores that fact that the sheriff is not authorized to make county employment policy either by statute or by delegation from the county commissioners. The sheriff is vested by the Texas Legislature with sole discretion in hiring deputies, not in establishing policy. State law gives appointment authority to the sheriff and the county is powerless to intervene. The sheriff's acts in appointing deputies are not the acts of the county, and therefore, cannot bind the county.

As this Court has repeatedly noted, whether a municipal official possesses final policymaking authority is a question of state law. *E. g.*, *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734, 1736-37 (1997). To begin with, the Texas Constitution explicitly grants the county commissioners court power and jurisdiction over all county business. TEX. CONST. art. V, § 18(b) (emphasis added). The Constitution restricts the duties of sheriffs only to those duties expressly prescribed by the State Legislature. TEX. CONST. art. V, § 23.

The commissioners set county employment policy. The Texas Legislature has not granted employment policymaking ability to sheriffs. Rather, sheriffs alone make specific appointment decisions, unreviewable by the county. TEX. LOC. GOV'T CODE ANN. § 85.003(c). The laws of Texas and at least ten other states impose a definite barrier between the sheriff and the county regarding deputy appointment decisions. *See* statutes cited, *supra*, p. 11.

As a result, Texas state courts have routinely refused to interpose any restrictions on the sheriff's selection of deputies. *Williams v. Bagley*, 875 S.W.2d 808 (Tex. App.—Beaumont 1994, no writ); *Commissioners Court of Shelby County v. Ross*, 809 S.W.2d 754, 756 (Tex. App.—Tyler 1991, no writ) ("both the appointment and tenure of a sheriff's deputy depend upon the sheriff's sole discretion") (citation omitted); *Murray v. Harris*, 112 S.W.2d 1091, 1093 (Tex. App.—Amarillo 1938, writ dism'd) ("officers elected by the people to discharge public trusts ... should be free to select persons of their own choice to assist them in the discharge of the duties of their offices").

When the electorate seeks a new sheriff, he or she is vested with the right, power, and duty to select those who will serve as deputies and to reappoint only those individuals whom he or she feels should continue service in the new administration. It is the unique nature of the relationship between the sheriff and deputy, and the public's expectations, their trusts in the sheriff, and the fact that deputies serve as the sheriff's alter ego, that provide the foundation for the sheriff's statutory entitlement to hire and fire deputies at his or her discretion. *See Renken v. Harris County*, 808 S.W.2d 222, 225 (Tex. App.—Houston 14th Dist. 1991, no writ).

A review of other relevant provisions of the Local Government Code reveals that the County Commissioners Court is the final policymaking authority. For example, the commissioners retain the power to authorize whether a county officer will be allowed to make appointments. *Id.* at

§ 151.001. Also, the code specifically grants county government the authority to classify all positions within its sheriff's department and to specify the duties and salary for each classification. *Id.* at § 152.071. *See also id.* at § 152.011 (allowing Commissioner's Court to set compensation for all county officers); Op. Tex. Att'y Gen. No. MW-268 (1980). The Commissioners Court also determines issues regarding hospitalization and medical insurance afforded to county employees. *Id.* at §§ 157.001-.002. The Commissioners Court decides whether a county may employ secretarial personnel and under what circumstances such employment may be justified. *Id.* at § 151.901.

These are all matters relating to *employment* policy, and the sheriff has absolutely no input as to these issues because the sheriff is not granted that right by the Texas Constitution or statute. A federal court is not justified in assuming that county policymaking authority lies somewhere other than where the applicable law purports to put it. *Praprotnik*, 485 U.S. at 126. Moreover, it is undisputed that the county commissioners had not delegated any employment policymaking authority to Molina. In fact, Respondents never approached the commission to ask that they be reassigned to another position in the county. It is thus apparent that Respondents are really complaining of the loss of their sheriff deputy positions, not the loss of county jobs.

Texas statutes underscore the important difference between the limited decisionmaking authority expressly vested in the office of sheriff and employment policymaking authority of the county.[8] Indeed, federal courts, including

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[8] The trial court instructed the jury that "[t]he sheriff is an official whose acts constitute final official policy of Fort Bend County. Therefore, if you find that the acts of the sheriff deprived the plaintiffs of constitutional rights, Fort Bend County is liable for such deprivations." (R. Vol. 5, Doc. 286, p. 3). Considering the scope of a sheriff's powers under Texas law, this legal determination was erroneous as a matter of law. Fort Bend County objected to this language, and re-urged its

the Fifth Circuit, have acknowledged this distinction. *See Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1244 (5th Cir. 1993) (concluding that local government officials are not necessarily policymakers on a particular issue, notwithstanding that they may possess authority to make the complained of employment decision); *Auriemma v. Rice*, 957 F.2d 397, 399-400 (7th Cir. 1992); *Bennett v. City of Slidell*, 728 F.2d 762, 735 F.2d 861 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985) (en banc opinions). Here, the Court of Appeals turned its back to this concept. Simply stated, Molina possesses statutory discretion to hire and fire deputies only but is not the "county official responsible for establishing county employment policy." *Pembaur*, 475 U.S. at 484 n. 12.

Assuming Molina made Respondents' appointment decisions based on political patronage concerns, and that those decisions constituted some kind of "official policy," then the policy was not, and could not have been, a policy of the county. For instance, the county commissioners might wish to adopt a resolution that Fort Bend County officially opposes patronage hiring practices of the sheriff.[9] Even

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argument in the post trial motion for judgment as a matter of law, on the grounds that the sheriff is not a policymaker for employment policy for the county. (Tr. Vol. X, at 240; R. Vol. 3, Doc. 300, p. 11-12). In overruling the county's objection at the charge conference, the trial court relied on *Turner v. Upton County*, 915 F.2d 133, 136 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). However, *Turner* is inapplicable because it concludes only that a Texas sheriff is a final policymaker in the area of law enforcement policy, a proposition Fort Bend County has never disputed and which is distinct from the legal issue at hand.

[9] Notably, even county commissioners in Texas, acting in any capacity other than as a whole official body, cannot bind the county, *Canales v. Laughlin*, 214 S.W.2d 451, 455 (Tex. 1948); *Stratton v. County of Liberty*, 582 S.W.2d 252, 254 (Tex.Civ. App.—Beaumont 1979, writ ref'd n.r.e.; Op. Tex. Att'y Gen. No. LO-95-053 (1995). Of course, a county commissioner, acting alone, also cannot bind the county.

though such a resolution must be regarded as the county's official policy, *the sheriff is statutorily empowered to disregard it.*

Respondents are attempting to distort and extend *Monell* to cover decisions made by officials which the county is powerless to stop or alter.[10] If the legal basis for municipal liability is the municipality's status as a corporation, then the county cannot be liable for decisions of sheriffs over whom the county has no control. Corporate employees who bind the company are always accountable to the entity's board of directors. Therefore, this case presents the next step in the evolution of the Court's jurisprudence outlining the boundaries of municipal liability under § 1983. The Court of Appeals's opinion, if allowed to stand unaddressed, will expose counties throughout the country which have a similar statutory framework to automatic liability if any sheriff is found to have violated the First Amendment in his or her appointment of deputies. As may be expected, and as the authority cited herein demonstrates, such suits against the municipality are and will continue to be a recurring matter. In fact, several deputies who were not reappointed by Molina's successor have already filed a lawsuit against the County. C.A. No. 97-2480; *Klentzman,*

Yet Respondents contend that a sheriff, simply by exercising a statutory power to chose deputies, necessarily binds the county.

[10] Interestingly, four justices (three in dissent) considered *Pembaur* as constituting, at least potentially, an unjustified extension of *Monell, Pembaur*, 475 U.S. at 497 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting). The dissent argued that the facts presented did not satisfy *Monell's* requirement that local government liability under § 1983 be imposed only when the injury is caused by government policy. *Id.* Similarly, Justice O'Connor expressed a concern that the majority standard "may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell.*" *Id.* at 491 (O'Connor, J., concurring).

et al. v. Fort Bend County, Texas; in the Southern District of Texas, Houston Division. Notably, in *Klentzman*, the district court *granted* the County's Rule 12(b)(6) motion to dismiss based upon the proposition that the county could not be liable for an unconstitutional hiring decision of the newly elected sheriff. On appeal a Fifth Circuit panel, which included two of the same judges who decided *Brady II*, reversed and remanded in light of *Brady II*.

Simply put, Molina's decisions to not reappoint Respondents cannot bind Fort Bend County because Molina did not make employment policy for the county and it cannot fairly be said, considering the scope of his state law conferred authority, that his independent decision is an act of the County. The county should only be liable if it supervised that decision in some way or delegated policy making authority to him, which it did not do.

3. *The County was not the "moving force" behind Molina's appointment decisions under* Tuttle *and* Brown.

In allowing municipal responsibility under § 1983, this Court has emphasized that such liability can only result where the official policy "causes an employee to violate another's constitutional rights." *Monell*, 436 U.S. at 692. Following *Monell*, this Court has steadfastly remained true to this causation requirement. In *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985), the Court reaffirmed *Monell's* mandate that to impose § 1983 liability upon a municipality, the municipal policy must be "the moving force of the constitutional violation." *Id.* at 820 (citing *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)). The *Tuttle* Court reversed the Tenth Circuit's holding that proof of a single incident of an unconstitutional activity by a police officer could suffice to establish municipal liability.

This Court again recognized the importance of a causal connection between the constitutional violation and the municipality in *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, (1997). After the plaintiff received injuries when being forcibly removed from an automobile, she sued the county and sheriff under § 1983 for wrongfully hiring the offending deputy without performing an adequate background check. After prevailing at trial on her claims against the county, the Fifth Circuit affirmed on the hiring claim. *Id.* This Court reversed, concluding that the Fifth Circuit's opinion could not "be squared with [the Court's] recognition that, in enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." *Id.* The court also admonished lower courts to "adhere to rigorous requirements of culpability and causation," lest "municipal liability collapses into *respondeat superior* liability." *Id.* at 1394.

Here, the Court of Appeals ignored the causation aspect of this Court's decisions which impose proper limitations on municipal liability. This error in the appellate court's analysis is partly why the opinion is so strained. In analyzing whether the sheriff is a final policymaker for the county, the Court of Appeals placed heavy emphasis on *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989). (App 13a-13a-14a). The Fifth Circuit's discussion of *Jett* exemplifies a misunderstanding of the county's argument and blurs the break in the causal link between the sheriff and the county as to deputy appointments. In the Court of Appeals, Fort Bend County emphasized the statutory provisions which placed county employment matters within the power of the commissioners court.[11] By citing these provisions, Fort Bend County was *not* arguing that it exercised "indirect

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[11] *See supra*, pp. 15-17.

constraint" over the sheriff's deputy hiring decisions. On the contrary, the county exercises no control or input whatsoever over the sheriff's appointment of deputies. The county's point was that state law, as expressed in the Texas Local Government Code, clearly establishes that the sheriff, in making deputy appointments, *is not acting for the county and not making county employment policy*. This Court has instructed lower courts "to ask whether government officials are final policymakers for the local government in a particular area, or on a particular issue." *McMillian*, 117 S.Ct. at 1737. Assuming that the Court of Appeals's characterization of the "area" in question is correctly phrased as "filling available employment decisions in the sheriff's department," (App. 11a) then certainly the causation element required by this Court's case law is not met because it cannot reasonably be said that the county is a "moving force" behind the sheriff's independent decision to appoint a particular deputy over another.

Additionally, the Court of Appeals's statement regarding the applicability of *McMillian* requires clarification. The court concluded that "the fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area." (App. 16a). The court then stated in a footnote that "[t]he County does not contend that it is not liable for the sheriff's unconstitutional employment practices on the ground that, under Texas law, sheriffs act as state policymakers as opposed to county policymakers in filling available deputy positions. ... We therefore do not address this issue." (App 16a, n. 4) (citing *McMillian*, 117 S.Ct. at 1740). Fort Bend County never went so far as to say that Molina was necessarily a state agent regarding his hiring decisions. However, Fort Bend County consistently argued that, whomever Molina acted for, he was not acting for the county

when making his appointment decisions. Thus, *McMillian* is relevant to this case and the Court of Appeals incorrectly dismissed the underpinnings of *McMillian*, that is, if the sheriff is not acting for the county when he or she performs the challenged action, then the county is not liable under § 1983. It is not necessary now, nor has it ever been, for Fort Bend County to establish that Molina was necessarily a state actor in making his hiring decisions, it is only necessary to show that he is not a county actor. Moreover, if the court's statement in footnote four is meant to imply that the sheriff is not a county employee, then the court should have addressed the County's argument that he is not a county policymaker for county employment matters and should have held that Molina's decisions to not hire Respondents do not bind the County.

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS IN RESTRICTING THE ABILITY OF SHERIFFS TO MAKE HIRING DECISIONS BASED ON POLITICAL CONSIDERATIONS AND MISAPPLIES THIS COURT'S DECISIONS.

A. In a previous ruling in this case, the Fifth Circuit recognized that it is in square conflict with the Fourth, Sixth, Seventh, and Eleventh Circuits in granting First Amendment protection to sheriff's deputies in the appointment process.

At least four circuits have expressly approved of what Molina is alleged to have done. *See, e.g., Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct,88 (1998); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992); *Upton*, 930 F.2d 1209; *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). These decisions are in conflict with

Fifth Circuit law. In one of its qualified immunity decisions in this very case, the Fifth Circuit — speaking through Judge Jones — recognized this square conflict. *Certiorari* is therefore warranted to clarify this important issue of First Amendment law as to which the circuits are divided.

The issue was important enough for the Fourth Circuit to hear en banc just last year. *Jenkins*, 119 F.3d at 1156. *Jenkins* considered the sheriff's role under North Carolina law, which is remarkably similar (if not identical) to Texas, and considered whether a newly elected sheriff unconstitutionally discharged several deputies. *Id.* at 1158. Like Respondents, the deputies in *Jenkins* claimed that they lost their jobs because they did not support the new sheriff. Despite the magistrate's recommendation that the deputies had failed to state a claim and that the sheriff was entitled to qualified immunity, the district court denied the sheriff's 12(b)(6) motion and denied qualified immunity. *Id.* En banc, the Fourth Circuit held that, based largely upon the consideration that North Carolina deputies are the alter ego of the sheriff and legally bind the sheriff by their conduct, the deputies may be lawfully terminated for political reasons under the *Elrod-Branti*[12] exception to prohibited political terminations. *Id.* at 1164. Further, the court held that sheriffs may dismiss deputies either because of party affiliation or campaign activity.[13] *Id.*

This case is indistinguishable from *Jenkins*. In reaching a decision in direct conflict with the Fifth Circuit,

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[12] *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

[13] Indicative of its reasoning that the sheriff's legal responsibility for his or her deputies demands an expectation that such deputies be loyal to the appointing sheriff, the court limited its opinion only to those deputies "actually sworn to engage in law enforcement activities on behalf of the sheriff." *Id.* at 1165. It is of course undisputed that all respondents were sworn law enforcement officers.

the Fourth Circuit expressly "follow[ed] the lead of the Seventh and Eleventh Circuits." *Id.* at 1163 (footnotes omitted). Although Fort Bend County explicitly directed the Court of Appeals to these conflicting cases, this panel declined to discuss, or acknowledge, them or their reasoning and denied rehearing en banc. As noted previously, and in seeming tension with the second panel, Judge Jones had already noted the substantial number of cases which stand at odds with the Fifth Circuit. *Brady I*, 58 F.3d at 174-75.

B. The decision below is incorrect.

In her opinion for the Fifth Circuit on qualified immunity in this case, Judge Jones expressed "concern about anomalies built into Fifth Circuit law." *Brady I*, 58 F.3d at 175. (App. 65a). Those concerns are well-founded. Judge Jones recognized the likely error of the Fifth Circuit's rule on this issue, but felt constrained to follow circuit precedent. More specifically, Fifth Circuit authority does not distinguish between "terminating" and "refusing to reappoint" deputies. *McBee v. Jim Hogg County*, 730 F.2d 1009, 1015 (5th Cir. 1984) (en banc). This aspect of Fifth Circuit jurisprudence nullifies state law which clearly provides that when a sheriff's term expires so does the term of each deputy. Here, Molina did not terminate any Respondent. Rather, each of their terms expired automatically by operation of law and Molina chose not to reappoint them, as he is authorized to do. As the Seventh Circuit has stated, "we can find no less restrictive means for meeting the needs of public service in the case of the deputy sheriff than to acknowledge a sheriff's absolute authority of appointment and to decline to reinstate those who do not support him." *Upton v. Thompson*, 930 F.2d 1209, 1217 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). This compelling state interest would be particularly well-served here where more than one

Respondent openly insisted they could not work for Molina were he to be elected.

The office of deputy sheriff warrants an expectation of a high degree of loyalty. In implementing the sheriff's basic law enforcement policies, a deputy must necessarily make some decisions that will actually create policy. *Id.* at 1162; *Upton*, 930 F.2d at 1215. Therefore, the position of deputy sheriff fits neatly within the exception to the prohibition on patronage firings. *Id. See Heideman*, 7 F.3d at 664; *Terry*, 866 F.2d at 377. "[B]ecause the offices of such highly-placed individuals serve as an essential link between the sheriff and the deputies he or she supervises, mutual confidence and political loyalty are of great importance, so much so that patronage decisions regarding those positions are not unconstitutional." *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987). Another compelling justification for granting sheriffs sole authority to choose the deputies who will assist in establishing and implementing the law enforcement policies of the administration is that Texas law deems a sheriff legally *responsible* for the official acts of a deputy. TEX. LOC. GOV'T CODE ANN. § 85.003(d). As an elected official, the sheriff discharges the public trust and carries the responsibility for the proper discharge of that trust and should thus be free to select persons of his or her own choosing. *Abbott v. Pollock*, 946 S.W.2d 513, 516-18 (Tex. App.—Austin 1997, writ denied). In the face of such statutorily imposed responsibility, a sheriff must have the right to presume that those who campaigned against him are not appropriate agents to serve under him, or as him, when they act as an alter ego. In particular, deputies who openly express hostile speech or conduct reasonably give rise to a justified belief in the mind of the sheriff-elect that those individuals will not support his policies. *Compare McBee*, 730 F.2d at 1015 (sheriff need not ignore person who has "blackguarded" sheriff's honesty and ability).

If Texas law, as articulated above, is unacceptable to deputies, they are not without recourse. County voters may establish a civil service system. *See* TEX. LOC. GOV'T CODE ANN. § 158.032 (Vernon 1988). Such a system typically adopts rules regarding various aspects of employment with the county, including promotions, disciplinary, grievances, and other matters relating to employee advancement and benefits. *Id.* at § 158.035. Under the Code, the sheriff would be entitled by law to exempt up to ten positions. *See Id.* at § 158.038(b). Such a system is the state's appropriate response to excessive political abuses which may accompany patronage practices. Ironically, in counties which adopt a civil service program, the sheriff actually possesses a clear understanding of which specific positions are appropriate for patronage considerations, a benefit not afforded by the current state of case law. Still, where the voters of a county have chosen to not adopt a civil service system the federal courts should not intrude on the voters' reasonable expectation that when they replace a sheriff they may *expect* the sheriff to change department personnel, as voters cannot unseat deputies directly. State law recognizes that it is the sheriff's deputies—perhaps more so than the sheriff—who implement and effect the changes mandated by the voters in electing a new sheriff.

This Court should unequivocally declare the right of a newly elected sheriff to consider patronage in the initial appointment of deputies or, alternatively, defer to state law which allows unencumbered discretion in the hiring of deputies to accommodate the compelling state interests held by voters, and does so through the least restrictive means. Where Texas citizens wish to restrict the sheriff's authority to decide who shall serve as deputy, they may do so by enacting a civil service system. Where Texas citizens refuse to adopt such a system, their interests should not be confounded by the opinion of jurors, some of whom are

chosen from other counties, because such a system simply reallocates the authority to select the most suitable personnel for the sheriff's office under the thinly veiled guise of civil rights enforcement.

Elected officials rely on their employees to help create, implement, and effectuate the programs and policies which likely have been the platform of their election to office. It greatly advances the goals of those officials, and the expectations of the voting electorate, if officials are able to place trusted individuals who likely share their political views into positions of sensitivity. Such a system fosters loyalty and furthers the effective day-to-day operation of the administration. Yet the reasoning of the Fifth Circuit panel literally renders meaningless Texas's law requiring automatic termination of a sheriff's deputy upon election of a new sheriff and raises the question of how Texas may implement this important governmental concern. The court's opinion compels a newly elected sheriff to maintain each deputy employed by a predecessor rather than risk liability exposure. This result not only undermines the state's intent underlying the statute, but increases the likelihood that those deputies who lose their commissions will be forced upon a newly elected sheriff and a public powerless to remove them.

CONCLUSION AND PRAYER

Monell, this Court has observed, is a case about responsibility. *Pembaur*, 475 U.S. at 478. It cannot be said, consistent with *Monell's* teachings and common sense, that Fort Bend County is *responsible* for Molina's appointment decisions. The county had nothing to do with them. In reaching an opposite conclusion, the Fifth Circuit has placed itself in direct conflict with other circuits as to both questions the County presents for review. To resolve this conflict, and to advance the interests of decision

uniformity nationwide, this Honorable Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

U.S.COURT OF APPEALS
FILED
AUG 18 1998
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20886

KENNTH CRAIG BRADY, ET AL
Plaintiffs
KENNETH CRAIG BRADY; BOBBY LEE EVANS; WILLIAM E FORTENBERRY; JAMES ARTHUR LEACH; STEPHEN LEON SKINNER; GUY "NUBBIN" CHAMBLEE
Plaintiffs-Appellees-
Cross-Appellants

v.

FORT BEND COUNTY, ET AL
Defendants
FORT BEND COUNTY
Defendant-Appellant-
Cross-Appellee

****

ANTONIO O ROSAS
Plaintiff-Appellee-
Cross-Appellant

v.

FORT BEND COUNTY, ET AL
Defendants
FORT BEND COUNTY
Defendant-Appellant-
Cross-Appellee

Appeal from the United States District
Court for the Southern District of Texas,
Houston

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 07/02/98 5 Cir., ___, ___ F.3d ___)

Before KING, EMILIO M GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:

(x) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P and 5TH CIR.R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED.R.APP.P. and 5TH CIR.R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge
REHG-6

APPENDIX B

U.S.COURT OF APPEALS
FILED
JUL 02 1998
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20886

KENNETH CRAIG BRADY, ET AL,
Plaintiffs,
KENNETH CRAIG BRADY; BOBBY LEE EVANS; WILLIAM E. FORTENBERRY; JAMES ARTHUR LEACH; STEPHEN LEON SKINNER; GUY "NUBBIN" CHAMBLEE,
Plaintiffs-Appellees-
Cross-Appellants,

v.

FORT BEND COUNTY, ET AL,
Defendants,
FORT BEND COUNTY,
Defendant-Appellant-
Cross-Appellee.

ANTONIO O ROSAS,
Plaintiff-Appellee-
Cross-Appellant,

v.

FORT BEND COUNTY, ET AL,
Defendants,
FORT BEND COUNTY,
Defendant-Appellant-
Cross-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before KING, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

KING, Circuit Judge:

Defendant Fort Bend County appeals the district court's entry of judgment in favor of plaintiffs Kenneth Craig Brady, Guy "Nubbin" Chamblee, Bobby Lee Evans, William Fortenberry, James Leach, Stephen Leon Skinner, and Antonio O. Rosas based upon a jury verdict in favor of plaintiffs on their claims under 42 U.S.C. § 1983 that R. George Molina, the former sheriff of Fort Bend County, failed to rehire them based upon their exercise of their First Amendment rights of free speech and association. For the reasons set forth below, we affirm the district court's judgment.

I. FACTUAL BACKGROUND

In 1992, R. George Molina, a Democrat, ran for sheriff of Fort Bend County, Texas, against the Republican incumbent, Perry Hillegeist. At that time, plaintiffs Kenneth Craig Brady, Guy "Nubbin" Chamblee, Bobby Lee Evans, William Fortenberry, James Leach, Stephen Leon Skinner, and Antonio O. Rosas (collectively, the Plaintiffs) worked under Hillegeist as deputy sheriffs in the Fort Bend County Sheriff's Department. Brady was the lieutenant of the detective bureau of the sheriff's department. Chamblee was a detective sergeant in narcotics. Evans was a patrol sergeant. Fortenberry was the lieutenant in charge of the county jail, and Leach was a sergeant supervised by Fortenberry. Skinner was a patrol deputy. Rosas was the sergeant who supervised the warrants division.

Each of the Plaintiffs supported Hillegeist's bid for re-election. Although their levels of participation varied, the Plaintiffs generally supported Hillegeist by attending rallies, posting signs, and campaigning door-to-door. Molina won the election in November 1992. That month, he appointed a transition team to determine which of the police department's current employees would be reappointed under his administration. The transition team met on November 4, 1992, and on December 1 or 2, 1992. On December 4, 1992, Molina delivered letters to the Plaintiffs stating that they would not be rehired on January 1, 1993. On December 31, 1992, Molina was sworn into office. Under Texas law, the Plaintiffs' terms as deputies expired automatically when Hillegeist's tenure of office expired on December 31, 1992. *See Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex. App.--Austin 1997, writ denied); *El Paso County Sheriff's Deputies' Ass'n v. Samaniego*, 802 S.W.2d 727, 728 (Tex. App.--El Paso 1990, writ denied). On January 1, 1993, Molina, now officially occupying the office of sheriff, reaffirmed his decision not to rehire the Plaintiffs and signed letters to this effect.

II. PROCEDURAL BACKGROUND

On February 16, 1993, Brady sued Fort Bend County (the County) and Molina in federal district court under 42 U.S.C. § 1983, alleging that Molina failed to rehire him on the basis of his political support for Hillegeist in the sheriff's race and that this action constituted a violation of the First Amendment. Evans, Fortenberry, Leach, Skinner, and Chamblee subsequently joined as plaintiffs in the action. On June 30, 1993, the County moved for summary judgment, and Molina also moved for summary judgment based on qualified immunity. The district court denied both motions. Molina appealed, and a panel of this court affirmed the district court's denial of summary judgment. *See Brady v.*

Fort Bend County, 58 F.3d 173, 176 (5th Cir. 1995). The court then granted Molina's suggestion of rehearing en banc. *See id.*

On July 21, 1994, while en banc consideration of Molina's appeal in Brady's suit was pending, Rosas filed a separate action against the County and Molina. The County and Molina both moved to dismiss. The district court denied their motions, and Molina filed another appeal. The Plaintiffs voluntarily dismissed Molina as a party defendant in both the Brady and Rosas suits. As a result, this court dismissed both appeals. The Rosas and Brady suits were then consolidated at the district court level.

On June 3, 1996, trial commenced. The County moved for judgment as a matter of law at the close of the Plaintiffs' case and at the close of the evidence. The district court denied these motions. On June 19, 1996, the jury returned a verdict in favor of all of the Plaintiffs, awarding damages for back pay to all of the Plaintiffs, back benefits to all of the Plaintiffs except Chamblee, Evans, and Skinner and mental anguish to all of the Plaintiffs.[1] The County moved for judgment as a matter of law, a new trial, or remittitur. The district court granted the County's motion in part and set aside the jury's award of mental anguish damages as to all of the Plaintiffs except Skinner on the ground that insufficient evidence supported these awards. It denied the motion in all other respects. On August 15, 1996, the district court entered final judgment consistent with the jury's verdict except that it awarded mental anguish damages only to Skinner. The district court also awarded the Plaintiffs prejudgment interest on back pay and attorney's fees of $751,370.75. Additionally, the district court ordered

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[1] The jury awarded $25,000 in mental anguish damages to Rosas, $15,000 to Leach, and $10,000 to each of the other Plaintiffs.

reinstatement of the Plaintiffs but stayed the reinstatement pending appeal.

The County timely filed a notice of appeal, and all of the Plaintiffs except Skinner cross-appealed the district court's partial grant of the County's motion for judgment as a matter of law on the issue of mental anguish damages.

III. DISCUSSION

The County appeals the district court's judgment in favor of the Plaintiffs on the following grounds:

1. As a matter of law, the County is not liable for Molina's hiring decisions because Molina was not a final policymaker regarding the County's employment policy.

2. First Amendment law should defer to a state's right to decide, as Texas has done, whether patronage practices will exist as part of political systems.

3. The County's interest in efficiency in the services that it provides through its employees outweighed the interests of the Plaintiffs in engaging in political activity in support of Hillegeist.

4. Molina's actions could not have violated the Plaintiffs' First Amendment rights because he merely failed to rehire them as opposed to discharging them before their terms expired.

5. The district court erred in instructing the jury that the County was required to prove that

Molina possessed legitimate reasons for his failure to rehire the Plaintiffs by a preponderance of the evidence.

6. Insufficient evidence exists to support the jury's conclusion that Molina's decision not to rehire the Plaintiffs was based upon their political support for Hillegeist.

7. The district court erred in admitting certain testimony from one of the Plaintiffs' witnesses because the testimony was irrelevant and prejudicial.

8. The district court's award of attorney's fees is supported by insufficient evidence.

All of the Plaintiffs except Skinner contend on appeal that the district court erred in partially granting the County's motion for judgment as a matter of law and setting aside their awards of damages for mental anguish. We consider each of these issues in turn.

A. Whether Molina Was a Final Policymaker

The County correctly observes that municipal liability for constitutional torts arises when the execution of an official policy or custom of the municipality causes the constitutional injury. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978). It also recognizes that a single action by a municipal official possessing final policymaking authority regarding the action in question constitutes the official policy of the municipality and that the determination of whether a municipal official wields final policymaking authority regarding a particular action constitutes a question of state law. *See McMillian v. Monroe*

County, 117 S.Ct. 1734, 1736-37 (1997). The County contends that Molina was not acting in a capacity as the County's final policymaker when it declined to rehire the Plaintiffs. In support of this contention, the County relies on the following passage from Justice Brennan's Opinion in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986):

> Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official--even a policymaking official--has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.[12]

[12] Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.

Id. at 484 & n. 12 106 S.Ct. 1292 (citations and other footnotes omitted).

The County argues that Molina is analogous to the hypothetical sheriff in *Pembaur*. The County concedes that, under Texas law, Molina constituted its final policymaker with respect to law enforcement and that his actions in this capacity could form a basis for county liability. *See Turner v. Upton County*, 915 F.2d 133, 136 (5th Cir. 1990) (holding that, in Texas, a sheriff wields final policymaking authority in the county regarding law enforcement). However, it contends that he did not constitute a final policymaker with respect to county employment policy generally and thus that his failure to rehire the Plaintiffs cannot subject the County to liability. The County observes that the Texas Local Government Code requires the sheriff to apply to the commissioners court of the county for authorization to appoint employees. *See* TEX. LOC. GOV'T CODE ANN. § 151.001 (Vernon 1988). It further notes that the commissioners court establishes the classifications of employees in the sheriff's department and sets the salaries for each classification. **See id.** § 152.071. The County also observes that the commissioners court establishes policy regarding the entitlement of numerous classes of county employees to benefits such as health and accident insurance. *See id.* § 157.002 (Vernon Supp. 1998). The County therefore argues that the commissioners court, rather than the sheriff, constitutes the final policymaker regarding county employment policy.

The County correctly observes that we would paint with too broad a brush were we to conclude that the County may be liable for constitutional injury arising from Molina's decision not to rehire the Plaintiffs because he constituted the County's final policymaker with respect to law enforcement. As the Supreme Court recently observed, in determining

whether Molina constituted a "policymaker" for the County, the relevant inquiry "is not whether [he] act(ed) for . . . (the County) in some categorical, 'all or nothing' manner." *McMillian*, 117 S.Ct. at 1737. Rather, the Court's "cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government *in a particular area, or on a particular issue*." *Id.* 117 S.Ct. at 1737 (emphasis added); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion) (observing that, in order for municipal liability to attach based upon an unconstitutional act by its official or officials, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the [municipality's] business"). However, the County's argument goes astray because it then urges us to paint with too broad a brush and hold that Molina did not act as the County's final policymaker when he declined to rehire the Plaintiffs because Molina did not establish the County's employment policy *generally*. Rather, the appropriate inquiry is whether the sheriff is the County's final policymaker with respect to the specific action at issue here--*filling available employment positions in the sheriff's department*. With respect to this specific act, Texas law unequivocally vests the sheriff with final policymaking authority. Section 85.003(c) of the Texas Local Government Code provides that deputies "serve[] at the pleasure of the sheriff." TEX. LOC. GOV'T CODE ANN. § 85.033(c) (Vernon 1988). Moreover, § 151.004 prohibits the commissioners court from exercising any influence over whom the sheriff appoints to serve as deputies. *See id.* § 151.004. As one Texas Court of appeals has observed,

> By including such provision in the law, the Legislature established a public policy to the effect that officers elected by the people to discharge public

> trusts and upon whose shoulders rests the responsibility for their proper discharge should be free to select persons of their own choice to assist them in the discharge of the duties of their officers.

Murray v. Harris, 112 S.W.2d 1091, 1093 (Tex. Civ. App.--Amarillo 1938, writ dism'd); *see also Commissioners Court v. Ross*, 809 S.W.2d 754, 756 (Tex. App.--Tyler 1991, no writ) ("The commissioners court may limit the number of deputies authorized, but it has no power over naming the individuals to be appointed.").

Sheriffs under Texas law are unlike the hypothetical sheriff discussed in *Pembaur* because a Texas sheriff is not merely granted "discretion to hire and fire employees" by the commissioners court. *Pembaur*, 475 U.S. at 484 n. 12. Rather, the Texas legislature has vested sheriffs with such discretion, and the sheriff's exercise of that discretion is unreviewable by any other official or governmental body in the county. Texas sheriffs therefore exercise final policymaking authority with respect to the determination of how to fill employment positions in the county sheriff's department. *See Turner*, 915 F.2d at 136 ("Because of the unique structure of county government in Texas . . .elected county officials, such as the sheriff . . . hold [ ] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein . . . . Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.'" (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (quoting *Monell*, 436 U.S. at 694))) (alterations in original

)); *see also Davis v. Ector County*, 40 F.3d 777, 784 (5th Cir. 1994) (holding that a Texas district attorney's termination of an employee under his supervision constituted an act of final policymaking authority within the county because he "enjoyed free reign over the District Attorney's office and set department policy without oversight").[2]

The County argues, however, that the commissioners court possesses an indirect ability to control the sheriff's exercise of discretion to hire and fire deputies because it determines the number of deputy positions that the sheriff will be allowed to fill. *See* TEX. LOC. GOV'T CODE ANN. §; 151,001; *Ross*, 809 S.W.2d at 756. We acknowledge that a plurality of the Supreme Court has stated that, "[w]hen an official's discretionary decisions are constrained by policies not of that official's making," that official does not wield final policymaking authority with respect to his discretionary actions. *Praprotnik*, 485 U.S. at 127 (plurality opinion). However, the Court's later decision in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), implies

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[2] The County contends that this court's decision in *Gunaca v. Texas*, 65 F.3d 467 (5th Cir. 1995), mandates a conclusion that Molina did not act as a final policymaker in choosing not to rehire the Plaintiffs. In *Gunaca*, the plaintiff, a county-investigator, argued that the defendant county was liable for the district attorney's dismissal of the plaintiff on the basis of his political affiliation. *See id.* at 473 n.5. The county argued that no municipal liability existed because, "under Texas law, the district attorney possesses exclusive authority to hire and fire investigators." *Id.* The plaintiff's sole response to this argument was that the county could nonetheless be liable for the patronage dismissal because "municipal officials controlled investigators' salary and employment benefits." *Id.* A review of the *Gunaca* opinion and the briefs filed in that case reveals that the plaintiff did *not* argue that the fact that the district attorney had exclusive discretion in the hiring and firing of investigators rendered him the county's policymaker in this regard, which would give rise to municipal liability. *Gunaca* therefore does not control our decision in this case.

that the type of indirect constraint to which the County refers does not indicate that an official does not possess final policymaking authority.

In *Jett*, the petitioner brought suit under 42 U.S.C. §§ 1981 and 1983, contending that his transfer from a coaching position by the superintendent of the Dallas Independent School District (DISD) violated his constitutional rights to due process and equal protection. *See id.* at 707. The petitioner further argued that DISD was liable for the superintendent's actions. *See id.* After concluding that § 1983 "provides the exclusive federal damages remedy for the violation of rights guaranteed by § 1981 when the claim is pressed against a state actor," *see id.* at 735, the Court remanded the case for a determination of whether DISD's superintendent wielded final policymaking authority "*concerning the transfer of school district personnel.*" *Id.* at 738 (emphasis added). This statement of the issue to be resolved by the Court of Appeals on remand indicates that it was unnecessary for the superintendent to exercise final policymaking authority over other aspects of school district employment policy, such as hiring and firing school district personnel. To the extent that final policymaking authority regarding the hiring and firing of school district personnel was 'vested in an official other than the superintendent, that other official could certainly "constrain" the superintendent's exercise of authority to transfer school district personnel by simply firing the individuals that the superintendent wished to transfer. This is precisely the sort of indirect constraint that the commissioners court can place upon the sheriff's exercise of his authority to hire and fire deputies. That the municipal official need only exercise final policymaking authority with respect to the *specific* action allegedly constituting a constitutional tort thus indicates that the sort of indirect constraint that the County contends limits a Texas sheriff's discretion in hiring and firing deputies does not

indicate a lack of final policymaking authority on the part of the sheriff regarding such decisions.

The County further argues that sheriffs do not possess final policymaking authority with regard to filling employment positions in the sheriff's department because the Texas legislature has authorized the creation of a civil service commission empowered to "adopt, publish, and enforce rules regarding . . . matters relating to the selection of employees and the procedural and substantive rights, advancement, benefits, and working conditions of employees." TEX. LOC. GOV'T CODE ANN. § 158.035(a) (Vernon Supp. 1998). However, establishment of a civil service commission requires a petition by at least twenty percent of the employees of the sheriff's department requesting the creation of a civil service system as well as a majority of the employees in the department in favor of the creation of such a system. *See id.* §§ 158.033-.034 (Vernon 1988 & Supp. 1998). No such system existed in the County when Molina took office. Thus, for the time period relevant to this lawsuit, final policymaking authority regarding the selection of deputies remained vested in the sheriff of the County.[3]

The County next argues that Molina clearly did not exercise final policymaking authority with respect to the appointment of deputies to available employment positions on December 4, 1992, when he delivered the letters to the Plaintiffs indicating that he did not intend to rehire them. This argument is devoid of merit because, once Molina

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[3] We note that, even if the County's sheriff's department were to adopt a civil service system, doing so would not strip the sheriff of all final policymaking authority regarding the selection of deputies. This is so because the Local Government Code provides that the sheriff retains the ability to exempt a certain number of positions within the department from the civil service system. *See* TEX. LOC. GOV'T CODE ANN. § 158.038 (Vernon Supp. 1998).

assumed office, he reaffirmed his intention not to rehire the Plaintiffs and gave effect to that intent by not rehiring the Plaintiffs. After Molina took office, he was a state actor wielding the policymaking authority described above with respect to filling available deputy positions in the sheriff's department.

Finally, the County contends that, because Texas sheriffs possess "unfettered authority to appoint deputies," a conclusion that the sheriff wields final policymaking authority with respect to filling available deputy positions "subjects every Texas county to recurring lawsuits after every election even though the counties are forbidden from interfering in the Sheriff's appointment decisions." As indicated above, however, the fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area.[4] We therefore conclude that, when Molina failed to rehire the Plaintiffs, he acted in a final policymaking capacity. As such, if his decision not to rehire the Plaintiffs constituted an infringement of their First Amendment rights; the County is liable for the consequences of that decision.

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[4] The County does not contend that it is not liable for the sheriff's unconstitutional employment practices on the ground that, under Texas law, sheriffs act as state policymakers as opposed to county policymakers in filling available deputy positions. *See McMillian*, 117 S.Ct. at 1740 (holding that an Alabama county was not liable for the constitutional torts resulting from the law enforcement policy of the county's sheriff because, under Alabama law, sheriffs acting in a law enforcement capacity constitute officers of the state rather than the county). We therefore do not address this issue.

B. Whether Molina's Failure To Rehire the Plaintiffs Violated Their First Amendment Rights

The County advances a number of arguments as to why Molina's failure to rehire the Plaintiffs, even if motivated by their political activities in support of Hillegeist, nonetheless did not violate their First Amendment rights. We consider each of these argument in turn.

1. Texas's "right" to allow employment decisions on the basis of political affiliation

The County first observes that, through relevant provisions of the Texas Local Government Code, the Texas Legislature has manifested a clear intention that deputy sheriffs "serve [] at the pleasure of the sheriff." TEX. LOC. GOV'T CODE ANN. § 85.003. It contends that "[w]hether to endorse a patronage system is a policy decision that should be left to the judgment of the people's elected representatives." The County therefore argues that our First Amendment jurisprudence should "defer" to Texas's "right to decide . . . whether patronage practices will exist as part of local political systems." This argument need not detain us long.

For more than two decades, the Supreme Court has consistently held that "the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990); *see also Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). In essence, the County asks us to overrule

the long line of Supreme Court authority placing limits on political patronage practices, along with the substantial body of case law in this circuit interpreting and applying that authority. *See, e.g., Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988 (5th Cir. 1992) (en banc); *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc). This is something that we obviously lack the authority to do, even if we had the inclination.

In a similar vein, the County argues that the Plaintiffs were well aware that they served at the pleasure of the sheriff and that their tenures ended automatically with the end of the sheriff's term. It therefore contends that the Plaintiffs had no legitimate expectation of, or right to, being rehired by Molina. The County thus claims that Molina's failure to rehire the Plaintiffs, even if based upon their political activities in support of Hillegeist, could not have violated their First Amendment rights. In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court observed that, "[f]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Id.* at 597. "The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly." *Elrod*, 427 U.S. at 361 (Brennan, J.). In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court observed that "[i]t is too late in the day to doubt that the libert[y] of . . . expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404. If it was too late in the day three-and-a-half decades ago to consider the County's argument that the Plaintiffs' First Amendment rights could not have been violated by Molina's failure to rehire them because they had no right or

expectation of being rehired, it is certainly too late to consider it now.

The County finally contends that it is unfair to subject it to a new round of lawsuits every four years when a new sheriff is elected merely because Texas law allows patronage dismissals by county sheriffs. The answer to this contention is that, if the Texas legislature wishes to minimize the potential liability of local government for unconstitutional practices by local governmental officials, it can pass laws constraining the ability of such officials to engage in unconstitutional practices. As the County acknowledges, the legislature has done just that by giving counties the option of creating a civil service system for sheriff's departments that at least limits to some degree the sheriff's ability to engage in unconstitutional hiring practices. The fact that the Fort Bend County Sheriff's Department chose not to utilize this option provides no justification for allowing constitutional violations by the County's sheriff to go unremedied.

2. Failure to Rehire Versus Discharge

The County next contends that Molina could not have violated the Plaintiffs' First Amendment rights because he merely declined to rehire them rather than firing them. In *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984) (en banc), we addressed a factual scenario identical in all material respects to the one at issue here and concluded that "the fact that the deputies were terminated by a 'failure to rehire' rather than a 'dismissal' is irrelevant to the question of whether they were impermissibly terminated for exercising their First Amendment rights." *Id.* at 1015 (footnote omitted); *see also Warnock v. Pecos County*, 116 F.3d 776, 779 n.1 (5th Cir. 1997) ("For our purposes, there is no difference between firing and declining to re-appoint.").

The Supreme Court subsequently reached a similar conclusion in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), where it determined that the same limitations that the First Amendment imposes upon a public employer's power to discharge employees based upon their political affiliation apply to a public employer's decision to transfer, recall, and hire on that basis. *Id.* at 74 *cf. Branti*, 445 U.S. at 512 n.6 ("[T]he lack of a reasonable expectation of continued employment is not sufficient to justify dismissal based solely upon an employee's private political beliefs."). While *Rutan* addressed only political patronage, we have applied it to cases involving public employer retaliation for employees; exercise of their right to free speech. *See Pierce v. Texas Dep't of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149-50 (5th Cir. 1994); *Click v. Copeland*, 970 F.2d 106, 110-11 (5th Cir. 1992). The County's claim that a failure to rehire a public employee cannot violate the employee's First Amendment rights therefore lacks merit.

3. Balancing the interest of the County as employer against the interests of the Plaintiffs as citizens

In further support of its contention that Molina's failure to rehire the Plaintiffs did not violate their First Amendment rights even if based upon their political activity and affiliation, the County makes two additional arguments that are closely intertwined. First, it argues that sheriff's deputies in Texas may be freely dismissed on political patronage grounds. Second, the County argues that governmental interests outweighed the Plaintiffs' interest in engaging in political activity in support of Hillegeist. A summary of the relevant First Amendment law as established in Supreme Court precedent and as applied in this circuit will facilitate a clear disposition of these claims.

a. Relevant First Amendment Law

It is well established that the First Amendment places certain constraints upon dismissals from public employment based upon political affiliation and speech. As noted in Part III.B.1, *supra*, limitations on dismissals based upon a public employee's political affiliation, or political patronage dismissals, emerged from the Supreme Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). In *Elrod* the Court held that "a nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod*, 427 U.S. at 375 (Stewart, J., concurring).[5] In *Branti*, the Court clarified the rule announced in *Elrod* regarding when party affiliation may serve as a legitimate basis for terminating a public employee as follows:

> It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state

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[5] The *Elrod* court was fractured, with Justice Brennan delivering the judgment of the Court and authoring a "wide-ranging opinion" in which two other justices joined. *See Elrod*, 427 U.S. at 349 (Brennan, J.); *id.* at 374 (Stewart, J., concurring). However, as the Court recently observed, "five Justices found common ground in the proposition" stated in the text above. *O'Hare Truck Serv., Inc. v. City of Northlake, 116 S.Ct. 2353, 2357 (1996)*

> government. On the other hand, it is equally clear that the Governor of the State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label "policymaker: or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court held that certain limitations exist on the ability of a government employer to discharge employees based upon the employees' exercise of their right to free expression. Specifically, the Court concluded that the First Amendment precludes a discharge based upon an employee's exercise of his right to free expression if two criteria are satisfied. First, the expression must relate to a matter of public concern. *See Connick*, 461 U.S. at 146; *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 992 (5th Cir. 1992) (en banc) (plurality opinion). Second, the employee's interest in "commenting upon matters of public concern" must outweigh the public employer's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *See also Kinsey*, 950 F.2d at 992.

In applying the Supreme Court's jurisprudence concerning public employers' adverse employment actions based upon employees' political affiliation and expression, this court has concluded that factual scenarios in which government employers discharge employees based upon their political affiliation, their exercise of their right to free expression, or some combination thereof "locate themselves on a spectrum." *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014 (5th Cir. 1984). At one end of the spectrum lie the factual scenarios like the ones at issue in *Elrod* and *Branti*, where the employee was discharged based solely upon grounds of political affiliation. *See id.* We have observed that, in such scenarios, little *Pickering/Connick*-style weighing is necessary because the employees are "discharged on the sole ground of their private and--for employment purposes--all but abstract political views. They [have] not campaign[ed], they [have] not even [spoken]: they [have] merely thought." *Id.* at 1014.

At the other end of the spectrum lie factual scenarios in which the government employee's "exercise of his constitutional privileges [has] clearly over-balanced his usefulness as an [employee]." *Id.* (internal quotation marks omitted). We have cited as examples of factual scenarios occupying this position on the spectrum those at issue in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), and *Duke v. North Texas State University*, 469 F.2d 829 (5th Cir. 1972), "where instructors had incited student disturbances that were sufficiently serious to call in question the ability of the academic authorities to maintain order on campus." *McBee*, 730 F.2d at 1014.

In circumstances falling between these to polar extremes, we have concluded that *Connick/Pickering* balancing constitutes the appropriate inquiry. *See McBee*, 730 F.2d at 1015. The Supreme Court recently confirmed

the correctness of this approach in *O'Hara Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996).

> *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by the government. It is true, on the other hand,. . . that the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government has imposed. A reasonableness analysis will also accommodate those many cases . . . where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable. This case-by-case process will allow the courts to consider the necessity of according to the government the discretion it requires in the administration and awarding of contracts over the whole range of public works and the delivery of governmental services.

Id. at 2358.

This summary of the applicable law provides the appropriate frame of reference from which to analyze the County's remaining arguments regarding whether Molina's failure to rehire the Plaintiffs, if based upon their political

activities in support of Hillegeist, constituted a violation of the First Amendment.

b. The County's arguments in the First Amendment's lexicon

The County's first argument--that sheriff's deputies in Texas may be freely dismissed on political patronage grounds-- rests upon a contention that sheriff's deputies occupy a position with respect to which "party affiliation is an appropriate requirement for . . . effective performance." *Branti*, 445 U.S. at 518. The County thus argues that, to the extent that Molina was privileged to choose not to rehire the Plaintiffs based solely upon their political *beliefs*, he was necessarily privileged to choose not to rehire them on the basis of their *expression of those beliefs*. The County's second argument--that its interests outweighed the Plaintiffs' interest in engaging in political activity in support of Hillegeist--constitutes a contention that Molina's failure to rehire the Plaintiffs did not violate their First Amendment rights because the *Pickering/Connick* balance weighs in favor of the County.

We conclude that the County's second argument subsumes its first and that we therefore need only address the second argument. If we accept the County's second argument, then we have no need to determine whether Molina's failure to rehire the Plaintiffs would have been constitutional had he done so solely on the grounds of the Plaintiffs' political affiliation. By the same token, if we reject the County's second argument and conclude that Molina's failure to rehire the Plaintiffs was unconstitutional if based upon the combination of their political affiliation and expression of that affiliation, then we necessarily reject the County's argument that Molina's failure to rehire the Plaintiffs was constitutional even if he based the decision

solely upon their political affiliation. Should we conclude that the Plaintiffs' expressive political activity in conjunction with their political affiliation did not sufficiently threaten to undermine the County's interest "in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, as to render Molina's failure to rehire the Plaintiffs on the basis of this activity constitutional, then we surely could not simultaneously conclude that the Plaintiffs' political beliefs alone threatened to undermine the County's interests to a degree sufficient to justify Molina's failure to rehire the Plaintiffs solely on the basis of their political belief. *See Kinsey*, 950 F.2d at 993-94; *McBee*, 730 F.2d at 1014; *cf. Kinsey*, 950 F.2d at 998-99; (Higginbotham, J., concurring) (concluding that, where the plaintiff superintendent claimed that the school board suspended him based upon both his political affiliation and speech on a matter of public concern, consideration of the plaintiff's speech was unnecessary because the fact that party affiliation was an appropriate requirement for the superintendent position of itself demonstrated that the suspension did not violate the plaintiff's First Amendment rights).

We therefore confine our inquiry to an application of the *Pickering/Connick* balance to determine whether Molina's failure to rehire the Plaintiffs, if based upon their political activity in support of Hillegeist, violated their First Amendment rights.

c. The Pickering/Connick balance

As noted earlier, we must determine, as a threshold matter, whether the expressive activity that the Plaintiffs contend motivated Molina's failure to rehire them constituted comment on a matter of public concern. *See Connick*, 461 U.S. at 146; *Kinsey*. 950 F.2d at 992. While speech need

not touch on a matter of public concern to possess First Amendment protection,

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147. Therefore, if the Plaintiffs' expressive activity "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [Molina's failure to rehire them]." *Id.* at 146.

We determine whether the Plaintiffs' expressive activity in this case constituted speech on a matter of public concern based upon its "content, form and context . . . as revealed by the whole record." *Id.* at 147-48; *Kinsey*, 950 F.2d at 992. The Plaintiffs testified that they engaged in a wide variety of political activity in support of Hillegeist. Fortenberry testified that he went to numerous political functions in support of Hillegeist and that he walked door-to-door campaigning for him. Leach testified that he walked door-to-door campaigning for Hillegeist and that, approximately once per week, he drove a truck with Hillegeist signs on the sides. Skinner testified that he placed Hillegeist signs in his yard and a Hillegeist bumper sticker on his van. He also testified that, when asked about the election, he would state his opinion that he considered Hillegeist to be the person most qualified for the sheriff position. Evans testified that he walked door-to-door campaigning for Hillegeist, put up Hillegeist signs, and participated in two fundraisers for Hillegeist. Rosas testified

that he put up Hillegeist billboards, walked door-to-door campaigning for him, and wore Hillegeist paraphernalia. Brady testified that he made and put up Hillegeist signs, wore Hillegeist shirts, and spoke with people at the county fair in support of Hillegeist. Chamblee testified that he organized a barbecue cook-off in support of Hillegeist at the county fair and that he wore a Hillegeist shirt and cap at this event. He also testified that he polled for Hillegeist on election day.

The County does not claim that the above conduct did not constitute expressive conduct subject to First Amendment protection. However, the County contends that the expressive conduct did not constitute a comment on a matter of public concern because the Plaintiffs supported Hillegeist merely to promote their own job security; they did not support him "based upon political ideology or concerns, or party affiliation." The County contends that this is evidenced by the fact that many of the Plaintiffs had worked at the sheriff's department for a number of years under a number of sheriffs and, during each sheriff's election, these Plaintiffs unfailingly supported the incumbent.

"[T]here can be no question that . . . campaigning for a political candidate . . . relate[s] to a matter of public concern." *Vojvodich v. Lopez*, 48 F.3d 879, 885 (5th Cir. 1995). The fact that the Plaintiffs may have been motivated to support Hillegeist out of a concern for their job security does not change our conclusion that their public displays of support for Hillegeist related to a matter of public concern. In *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992) this court considered en banc a claim that the school board suspended the plaintiff superintendent because he supported a political slate of incumbent board members who were defeated in the most recent election. *See id.* at 990. The losing slate supported the plaintiff's

continued superintendency, and the winning slate opposed it. *See id.* In applying the *Pickering/Connick* balancing test, the plurality concluded that, "[n]otwithstanding [the plaintiff's] interest in retaining his position as superintendent, his speech and association involved matters of great public concern--the performance of elected officials." *Id.* at 995. *Kinsey* thus indicates that the fact that the plaintiffs may have been motivated by self-interest rather than abstract political ideology does not indicate that their expressive activity in support of Hillegeist did not address a matter of public concern. The Supreme Court recently confirmed the correctness of this conclusion in *O'Hare* when it stated that "one's beliefs and allegiances ought not to be subject to probing or testing by the government." *O'Hare*, 116 S.Ct. at 2358. We conclude that the Plaintiffs' speech related to a matter of public concern, and we therefore proceed to the determination of whether the Plaintiffs' interests in their expressive activities in support of Hillegeist outweighed the County's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

We have read *Pickering*, as expounded in *Connick*, "to require a comprehensive but flexible analysis--a balance which weighs the particular aspects of the government's interest in effective service and the plaintiff's interest in freedom of speech that arise in each fact situation." *McBee*, 730 F.2d at 1016. We have read the Supreme Court precedent applying *Pickering* to indicate that a number of factors are relevant in balancing the interests of the individual against those of the state, including the following: (1) the degree to which the employee's activity involved a matter of public concern; (2) the time, place, and manner of the employee's activity; (3) whether close working relationships are essential to fulfilling the employee's public responsibilities and the potential effect of the employee's

activity on those relationships; (4) whether the employee's activity may be characterized as hostile, abusive, or insubordinate; (5) whether the activity impairs discipline by superiors or harmony among coworkers. *See Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992); *Matherne v. Wilson*, 851 F.2d 752, 760 (5th Cir. 1988).[6] We have also concluded that, in "cases involving public employees who occupy policymaker or confidential positions . . . , the government's interests more easily outweigh the employee's (as a private citizen)." *Kinsey*, 950 F.2d at 994; *see also Vojvodich*, 48 F.3d at 885. In this case, these factors militate strongly in favor of a conclusion that the Plaintiffs' political interest in political activity in support of Hillegeist outweighed the County's interest in efficiency in the services that it provides through its employees because any negative impact that the Plaintiffs' activity could have had on the efficiency of the sheriff's department was minimal, if their activity could have created any such impact at all.[7]

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[6] The above list of factors is nonexclusive. *See Vojvodich*, 48 F.3d at 885. As the Supreme Court observed in *Pickering* and *Connick*, "[b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statement may be judged.'" *Connick*, 461 U.S. at 154 (ellipses in original) (quoting *Pickering*, 391 U.S. at 569).

[7] In this case, the district court submitted to the jury the question of whether the Plaintiffs' interest in politically supporting Hillegeist outweighed the County's interest in efficiently providing the services it performs through its employees. The ultimate determination mandated by *Pickering* and *Connick* of whether a public employee's interest, as a citizen, in commenting on matters of public concern outweighs the government's interest, as an employer, in efficiency in the public services that it performs through its employees constitutes a legal determination. *See Kinsey*, 950 F.2d at 992 (describing the *Pickering/Connick* balance as a threshold legal issue); *Fyfe v. Curlee*, 902 F.2d 401, 405 (5th Cir.

1990) ("Th[e *Connick/Pickering*] balancing is to be conducted by the court as a matter of law, not fact.").

To the extent that *Pickering/Connick* balancing entails a fact-intensive inquiry, it might be appropriately characterized as a mixed question of law and fact--that is, a question entailing the application of a legal standard to a particular set of facts. *See Ornelas v. United States*, 116 S.Ct. 1657, 1662 (1996) (describing mixed questions of law and fact as questions as to which the "'historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated'" (alterations in original) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982))). Our decision in *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980), lends some support to this conclusion. In *Schneider*, we observed that, "[a]lthough the balancing test prescribed in *Pickering* is a question of law for the court, this circuit has recognized that in striking this balance between the interests of a governmental employee as a citizen and the interests of government in promoting efficiency of the services it performs through its employees, there are factual matters appropriate for determination by a jury." *Id.* at 919 n.4. The Court then cited with approval a Seventh Circuit case that apparently approved of the district court's submission of the *Pickering* balancing issue to the jury as a mixed question of law and fact. *See id.* (citing *McGill v. Board of Educ. of Pekin Elementary Sch. Dist.*, 602 F.2d 774, 777 (7th Cir. 1979) (affirming judgment for the plaintiff teacher where the district court had instructed the jury that the teacher's criticism of school district policy and officials was not constitutionally protected if "the teacher's actions materially and substantially interfere with the operation of the education process in the classroom" because sufficient evidence existed to support the jury's implicit conclusion that the teacher's actions did not cause disruption.)).

Schneider, however, was a pre-*Connick* case. *Connick* created some ambiguity as to the scope of our review of a determination at the district court level (either by the court or the jury) of whether a public employee's interest, as a citizen, in commenting on matters of public concern outweighs the government's interest, as an employer, in efficiency in the services it performs through its employees. In this regard, the Court stated:

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect. . . . Because of this obligation, we cannot avoid making an independent constitutional judgment on the facts of the case.

Connick, 461 U.S. at 150 n. 10 (internal quotation marks, citations, and modifications omitted). The Court then proceeded to discuss a number of the weight factors mentioned in the text, *supra*, and, in doing so, arguably paid little if any deference to the district court's conclusions. For example, the Court stated that it "agree[d] with the District Court that there [was] no demonstration . . . that the [plaintiff's expressive conduct] impeded [her] ability to perform her responsibilities" in the district attorney's office. *Id.* at 151. Additionally, the Court stated that "[t]he District Court was also correct to recognize that it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." *Id.* (internal quotation marks omitted).

One commentator has indicated that *Connick* did not make "altogether clear whether Pickering 'balancing' was a question of mixed law and fact, or entirely one of law" and that the case may indicate that appellate courts are to function as "super trier[s]-of-fact with regard to the extent of actual (or reasonably anticipated) detrimental impacts of given items of employee speech on particular 'working relationships' or specific governmental operations." *See* Richard Hiers, *Public Employees' Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U. FLA. J.L. & PUB. POL'Y 169, 281 (1993). The Eleventh Circuit seems to have adopted this approach, describing jury findings on *Pickering* balancing to be "only advisory." *Bryson v. City of Waycross*, 888 F.2d 1562 1566 n.2 (11th Cir. 1989); *see also Morales v. Stierheim*, 848 F.2d 1145, (11th Cir. 1988) (conducting a *Pickering* balance and apparently giving no deference to the findings regarding the factors relevant to the balance

The Plaintiffs' political activities in support of Hillegeist all took place while the Plaintiffs were off-duty. Their activities consisted of positive statements in support of Hillegeist rather than negative statements about Molina;[8] in no sense could their actions be characterized as hostile, abusive, or insubordinate. When asked at trial if he was aware of any negative statements about him made by the Plaintiffs, Molina responded that he was aware of none. In sum, this is a case of subordinate[s] who . . . expressed a reasoned preference for another superior;" It is not a case of subordinates who "blackguarded [a superior's] honesty and ability up and down the county." *McBee*, 730 F.2d at 1017;

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implicit in the jury's conclusion that municipal officials reassigned the plaintiff in violation of his First Amendment rights).

To date, we have avoided the issue of the extent to which the factors relevant to *Pickering/Connick* balancing outlined *supra* constitute factual matters subject to deference on appellate review. *See Matherne*, 851 F.2d at 761, (avoiding the issue of whether the district court could properly submit any portion of the *Pickering/Connick* balancing issue to the jury by concluding that, "even when [the court] view[ed] the facts in the light most favorable to the sheriffs in their official capacities, [the plaintiff's] activities were protected under the first amendment, and [the sheriff] was not justified in firing [the plaintiff] for those activities" (footnote omitted)). We likewise need not decide this issue here because, even if we conduct a de novo review of the factual record in evaluating the jury's determination that the Plaintiffs' interest in engaging in political activities in support of Hillegeist outweighed the County's interest in efficiency in the services it provides through employees in the sheriff's department, we conclude that the jury's determination was correct.

[8] The only evidence of any negative statements by any of the Plaintiffs regarding Molina to which the County directs our attention is Evans's testimony that, during a private conversation, he stated that he considered Molina to be a liar.

See also Matherne, 851 F.2d at 761.[9]

Furthermore, assuming that the Plaintiffs' former positions in the sheriff's department could be considered "policymaking" positions,[10] such a conclusion is not dispositive of our balancing inquiry. *See Vojvodich*, 48 F.3d at 884. As the Supreme Court observed in *Branti*, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved. *Branti*, 445 U.S. at 518; *see also Vojvodich*, 48 F.3d at 884. Indeed, the *Branti* court expressly observed that "party affiliation is not necessarily relevant to every policymaking or confidential position." *Branti*, 445 U.S. at 518. The record in this case strongly supports a conclusion that the Plaintiffs did not fall within "the exceptional class of public servants of whom political allegiance may be demanded." *Garcia v. Reeves County*, 32 F.3d 200, 205 (5th Cir. 1994).

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[9] At trial, testimony was introduced that John Font, one of the plaintiffs below, made negative comments to fellow officers about Molina. Notably, however, the jury returned a verdict against Font on his First Amendment claim, and he is not a party to this appeal.

[10] Our precedent clearly indicates that, at a minimum, Skinner, who served as a patrol deputy, did not wield policymaking authority. *See Click*, 970 F.2d at 108 (noting that the deputy positions of civil warrants officer and chief criminal district court bailiff did not involve policymaking); *Matherne*, 851 F.2d at 761 (holding that sheriff's deputy occupying the lowest rung in the chain of command in the department held a position that "imposed upon him the professional duties of a peace officer, not the politically sensitive requirements of a confidential aide to a politically elected official").

At trial, Molina testified as follows regarding the necessity of having individuals who supported him politically in the positions occupied by the Plaintiffs:

Q. Now, sir, wouldn't it be fair to say that it is your testimony that whether somebody supported Sheriff Hillegeist or whether they supported you would have nothing to do with the decision as to whether they were retained, demoted, transferred or let go? Correct?

A. That is correct.

Q. In other words, you didn't feel like you needed to have political--your own political supporters in any positions in the sheriff's department, correct?

A. That is correct.

. . .

Q. Okay. Now, would it be fair to say that for the position of lieutenant you did not have to have a person in that position to support you in a sheriff's election campaign?

A. No one needed to support me.

Q. Including lieutenants, correct, sir?

A. That is correct.

Q. In other words, you ought to be able to work with-as sheriff of Fort Bend County, you ought to be able to work with a lieutenant who had supported Sheriff Hillegeist, correct?

A. Yes.

Q. In fact, you ought to be able to work with, as sheriff of Fort Bend County, somebody who actively supported Sheriff Hillegeist, correct?

A. Yes, sir.

Q. So, in going through the decisions that you made, all the personnel decisions that you made--hiring, firing, demotions, et cetera--none of those--in none of those decisions was the political support of Hillegeist or you ever a factor at all?

. . .

A. It was never a factor.

Not only does this testimony indicate that the Plaintiffs, none of whom occupied a position higher than lieutenant in the sheriff's department chain of command, did not occupy positions for which political affiliation is an appropriate employment criterion, it also indicates that their political activity in support of Hillegeist had little if any potential for undermining close working relationships within the sheriff's department or for impairing discipline by superiors or harmony among coworkers within the department. We therefore conclude that the *Pickering/Connick* balance weighs in favor of the Plaintiffs and that Molina therefore was not privileged to decline to rehire them based upon their political support for Hillegeist.

C. Jury Charge's Placement of the Burden of Proof

The County contends that the instructions submitted to the jury improperly placed upon it the burden of persuading the jury that the reasons that it proffered for Molina's failure to rehire the Plaintiffs were pretextual. The jury instruction provided in relevant part as follows:

> In order to find that R. George Molina intentionally violated "Plaintiffs' rights under the First Amendment, you must find by a preponderance of the evidence that such speech and/or association activities were a substantial or motivating factor in his decision not to rehire them. To prove that their speech and/or association activities were a substantial or motivating factor in R. George Molina's decision not to rehire them, the plaintiffs do not have to prove that their speech and/or association activities were the only reason R. George Molina decided not to rehire them. Plaintiffs need only prove that their speech and/or association activities were a substantial consideration that made a difference in or influenced R. George Molina's decision not to rehire them.
>
> . . .
>
> If you find that plaintiffs have established each element of their claims, you must then decide whether the defendant has shown by a preponderance of the evidence that R. George Molina would have elected not to rehire the plaintiffs for other reasons even if plaintiffs had not engaged in their protected speech or association activities. If you find that R. George Molina would have elected not to rehire the plaintiffs for reasons wholly apart from the speech or association activity, then you verdict should be for defendant.

The jury instruction accurately reflects the holding of the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In that case, the Court held that a plaintiff claiming that a public employer retaliated against him for the exercise of his First Amendment right to free expression bears the burden of proving "that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'--or, to put it in other words, that it was a 'motivating factor' " in the defendant public employer's adverse employment action. *Id.* at 287 (footnote omitted). If the plaintiff carries this burden, the defendant public employer may nonetheless avoid liability if the trier of fact concludes that the defendant has "shown by a preponderance of the evidence that it would have reached the same decision (regarding the adverse employment action taken against the plaintiff) even in the absence of the protected conduct." *Id.*

The County argues that *Mt. Healthy* does not dictate the appropriate allocation of the burden of proof in this case because it applies only in "mixed motive" cases--that is, cases in which both legitimate and illegitimate factors motivated the defendant's adverse employment action. It contends that this is a "pretext" case--that is, a case in which the plaintiff contends that the defendant's adverse employment action was motivated by only illegitimate factors and that the legitimate factors proffered by the defendant as motivating its action are merely pretextual. "In pretext cases, the issue is whether either illegal or legal motives, but not both, were the "true" motives behind the decision.'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (White, J., concurring) (quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 N.5 (1983)). The County claims that the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), therefore provides the appropriate allocation of the

evidentiary burdens in this case. The County's argument fails for several reasons.

First, the *McDonnell Douglas* burden-shifting framework constitutes "the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964." *Id.* at 793-94;*see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). The County has cited no authority for the proposition that the *McDonnell Douglas* burden-shifting framework is applicable to patronage dismissal and free-speech retaliation cases.[11]

Second, the Supreme Court developed the *McDonnell Douglas* framework as a means of allowing Title VII claimants to prove up claims of unlawful discrimination in the absence of direct evidence of such discrimination. As such, the Court has indicated that the framework is applicable in the Title VII context only when the plaintiff's proof of discrimination is circumstantial; it "is inapplicable where the plaintiff presents direct evidence of discrimination." *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *see also Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 762 (5th Cir. 1996) ("The district court improperly analyzed this case. This is not a circumstantial evidence case, where we apply the *McDonnell Douglas* burden shifting framework; rather, this is a direct evidence case."). *Moore v. USDA*, 55 F.3d 991, 995 (5th Cir. 1995) (In the rare situation in which the

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[11] Our research has revealed one case in which a court of appeals considered the possibility that *McDonnell Douglas* may provide the appropriate framework for evaluating some patronage dismissal cases. *See McMillian v. Svetanoff*, 878 F.2d 186, 190 n.3 (7th Cir. 1989). However, the court in that case declined to decide the issue based on a conclusion that the plaintiff would fair no better under the *McDonnell Douglas* framework than under the *Mt. Healthy* framework. *See id.*

evidence establishes that an employer openly discriminates against an individual it is not necessary to apply the mechanical formula of *McDonnell Douglas* to establish an inference of discrimination." (internal quotation marks omitted)). As indicated in Part III.D, *infra*, in this case, the Plaintiffs presented direct evidence that their protected political activity motivated Molina not to rehire them. Specifically, they offered testimony from a number of witnesses that Molina admitted to them that he failed to rehire the Plaintiffs because of their political activity. *See Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) ("Direct evidence is evidence which, if believed, proves the fact without inference or presumption."). Thus, assuming that the *McDonnell Douglas* framework has potential application in patronage dismissal and free-speech retaliation cases, it can have no application here.

Third, the *Mt. Healthy* framework actually benefits defendants such as the County. Contrary to the County's contention, the *Mt. Healthy* framework does not improperly shift to the defendant the ultimate burden of persuading the trier of fact that it did not take an adverse action against the plaintiff based at least in part on an improper motive. *See Transportation Management*, 462 U.S. at 400 n.5 (1983), *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring). This point is demonstrated by the language of the jury instruction at issue here. The second paragraph of the instruction clearly indicates that the County did not need to establish that Molina would not have rehired the Plaintiffs even absent their protected conduct *unless the Plaintiffs carried their burden of proving that their political activity in support of Hillegeist was constitutionally protected and that this activity was a substantial or motivating factor in Molina's decision not to rehire them.*

In essence, *Mt. Healthy* may be properly construed as creating an affirmative defense because it allows the defendant to avoid liability once the plaintiff has carried his burden of proving that an improper consideration was a substantial or motivating factor in the defendant's adverse employment action by proving that it would have taken the same adverse action even in the absence of the improper consideration. *See Price Waterhouse*, 490 U.S. at 246 (plurality opinion) ("[T]he employer's burden (under the *Mt. Healthy* framework) is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another."); *Mooney v. Aramco Serv. Co.* 54 F.3d 1207, 1216 (5th Cir. 1995) (Although *Price Waterhouse*) which held that the *Mt. Healthy* framework is applicable in certain Title VII cases,) can be characterized as a method to prove discrimination, the mixed motives theory is probably best viewed as a defense for an employer."). As the district court observed in addressing the County's objection to its jury instruction, the instruction could in no way prejudice the County because it did nothing to diminish the Plaintiffs' burden of proving that their political activity in support of Hillegeist constituted a substantial or motivating factor in Molina's decision not to rehire them. Rather, this portion of the instruction aided the County by creating the possibility that the jury could conclude that the County was not liable even if it was persuaded that the Plaintiffs' political activity in support of Hillegeist was a substantial or motivating factor in Molina's decision not to rehire them.[12] We therefore reject the County's contention that the district court erred in instructing the jury on the evidentiary burdens applicable to the Plaintiffs' First Amendment claim.

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[12] Indeed, the County conceded as much when it declined the district court's offer to remove the entire paragraph from the instruction.

D. Sufficiency of the Evidence Supporting the Jury's Finding on Causation

The County contends that the district court erred in denying its motion for a new trial because the jury's finding that Molina failed to rehire the Plaintiffs based upon their political activity in support of Hillegeist is not supported by sufficient evidence or is against the great weight and preponderance of the evidence. Given our disposition of the County's claim regarding the proper evidentiary framework applicable to the Plaintiffs' First Amendment claim, we construe the instant claim as a contention that the district court should have ordered a new trial because (1) insufficient evidence existed to support the jury's conclusion that the Plaintiffs' political activity was a substantial or motivating factor in Molina's decision not to rehire them and (2) even if sufficient evidence existed to support this conclusion, the jury's further conclusion that Molina would not have made the same decision absent the Plaintiffs' political activity is against the great weight and preponderance of the evidence.

"A trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence." *Dotson v. Clark Equip. Co.*, 805 F.2d 1225, 1227 (5th Cir. 1986). This court may overturn a denial of a motion for a new trial only upon a finding of an abuse of discretion. *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 337 (5th Cir. 1991). Our review of a district court's decision to deny a motion for new trial is more deferential than our review of the district court's decision to grant such a motion. *Pryor v. Trane Co.*, __ F.3d __, NO. 97-40645, 1998 WL 163701, at *1 (5th Cir. Apr. 24, 1998); *Pagan*, 931 F.2d at 337.

> When the trial judge has refused to disturb a jury verdict, all the factors that govern our review of his

> decision favor affirmance. Deference to the trial judge, who has had an opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record, operates in harmony with deference to the jury's determination of the weight of the evidence and the constitutional allocation to the jury of questions of fact.

Shows v. Jamison Bedding, Inc., 671 F.2d 927, 930 (5th Cir. 1982). Accordingly, we will hold that the district court has abused its discretion in denying a motion for new trial on evidentiary grounds only if, viewing the evidence in the light most favorable to the verdict, we conclude that "the evidence points 'so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary [conclusion].'" *Pagan*, 931 F.2d at 337 (alterations in original) (quoting *Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982, 987 (5th Cir. 1989)); *see also Pryor*, _ _, F.3d at ___, 1998 WL 163701, at *1.

The record in this case contains more than ample evidentiary support for the jury's conclusion that (1) the Plaintiffs proved by a preponderance of the evidence that their political activity constituted a substantial or motivating factor in Molina's decision not to rehire them and (2) the County failed to prove by a preponderance of the evidence that Molina would have chosen not to rehire the Plaintiffs even absent their political activity. Numerous witnesses testified that Molina made statements to them indicating that he declined to rehire the Plaintiffs based upon their political activity in support of Hillegeist.

Carolyn Faye Dickerson, an employee of the Precinct 2 Justice of the Peace in Fort Bend County, testified that, while Molina occupied that position, she heard him say that

"some of the Hillegeist supporters at the first of the year probably would no longer have a job at the sheriff's department." Mary Salais, another employee of Molina while he served as a justice of the peace, testified that during the sheriff's election, Molina expressed anger when certain officers applied for warrants because they were campaigning for Hillegeist. She also testified that Molina told her that Brady "[did]n't know . . . which side [his] bread is buttered on" and that he "must not value his job or appreciate his job very much because he was campaigning for the wrong side." Additionally, Salais testified that during a conversation that she had with Molina after he took office, Molina stated, "We were out to dinner one night and that's when I say Tony Baloney [Rosas] putting Hillegeist signs in front of my signs and that really pissed me off, kid, and that's when I decided to fire his ass." Elmo Cepeda, a police officer with the Missouri City police department who worked for Fort Bend County's drug task force, testified that Molina told him that he declined to rehire Chamblee because he "was backing the wrong man." Larry Pittman, the officer who took Chamblee's place in the detective bureau, testified that Molina told him that Chamblee "had bet on the wrong horse and lost." Bettye Newberry, a former employee of Fort Bend County, testified that she had a conversation with Molina at a political rally during the sheriff's campaign and that, during their conversation, they saw Hillegeist with a group of his supporters, including Brady and Fortenberry. She testified that Molina said that Hillegeist's supporters were "going to be surprised if they don't have their jobs."

Additionally, the Plaintiffs offered a substantial amount of evidence indicating the high quality of their job performance. Brady received a rating of outstanding, the highest possible rating, on his last employment evaluation with the sheriff's department. Brady also testified that a few days before Molina officially announced that he intended to

run for sheriff, he telephoned Brady and stated that he considered Brady to be one of the "good people" in the sheriff's department. Fortenberry also received a rating of outstanding in his last employment evaluation in the sheriff's department. Skinner testified that he had been named Officer of the Year in 1992, the same year that Molina chose not to rehire him, and that he had received this award once before. Leach received an overall rating of "very good" in his last employment evaluation. Ken Lee, a captain in the sheriff's department during Molina's tenure as sheriff, testified that he considered Leach to be a good employee and a hard worker. Rosas received an overall rating of very good in his last employment evaluation, and his supervisor described him as having "done an excellent job of organizing the Warrants Section and implementing new procedures." Evans received a rating of very good on his last employment evaluation in the sheriff's department and consistently received evaluation ratings of very good or outstanding. Chamblee was part of the Fort Bend County Narcotics Task Force, which consisted of employees of numerous local agencies who worked in conjunction with federal agencies to ferret out drug trafficking in the area. Elizabeth Wiggington, a special agent for the Internal Revenue Service, testified that Chamblee's reputation in the federal agencies with which he worked on the Narcotics Task Force was "very good" and that he had been asked to teach at several law enforcement schools. Jack Schumacher, a special agent for the Drug Enforcement Administration, testified that Chamblee received an award from the International Narcotics Officers Association based upon his job performance.

The evidence outlined above provides a strong basis for the jury's conclusion that the Plaintiffs' political activity in support of Hillegeist constituted a substantial or motivating factor in Molina's decision not to rehire him. The County nonetheless contends that the record in this case demonstrates

overwhelmingly that Molina did not base his decision not to rehire the Plaintiffs on their political activity in support of Hillegeist. In support of this contention, the County points almost exclusively to various pieces of Molina's testimony. Specifically, the County points to Molina's testimony that political affiliation and campaign activities played no part in his decision not to rehire the Plaintiffs and that he was unaware of the political activities of some of the Plaintiffs. The County also notes that Molina testified that, in choosing not to rehire the Plaintiffs, he based his decision largely on negative statements made about each of the Plaintiffs' job performance during the transition team meetings. Additionally, the County relies on Molina's testimony that he chose not to rehire some of the Plaintiffs because he did not know them very well.

As the trier of fact, the jury had the exclusive authority to assess the credibility of witnesses, including Molina. It was therefore free to discredit Molina's testimony regarding his motivation for failing to rehire the Plaintiffs. *See Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995) ("'Even though we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to re-evaluate credibility of witnesses.'" (quoting *Rideau v. Parkem Indus. Servs., Inc.*, 917 F.2d 892, 897 (5th Cir. 1990)).

The County also argues that the fact that Molina rehired numerous Hillegeist supporters indicates that the Plaintiffs' support of Hillegeist did not motivate Molina's decision not to rehire them. While this constitutes probative evidence that Molina may not have chosen not to rehire the Plaintiffs because of their political affiliation, it certainly did not compel such a conclusion by the jury, particularly in light of testimony outlined above that Molina made statements indicating that he intended to make employment

decisions based upon political support. Moreover, Molina testified that it simply would not have been feasible not to rehire all of the Hillegeist supporters working in the sheriff's department when he took office.

In sum, the evidence in this case does not point so strongly and overwhelmingly in favor of a conclusion that (1) the Plaintiffs' political activity was not a substantial or motivating factor in Molina's decision not to rehire them or (2) that Molina would have chosen not to rehire the Plaintiffs absent their support for Hillegeist that a reasonable jury could not reach a contrary conclusion. We therefore conclude that the district court did not abuse its discretion in denying the County's motion for a new trial.[13]

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[13] The County contends that it is entitled to judgment as a matter of law on Skinner's First Amendment claim because he alleged that Molina refused to rehire him based upon the political activity of his wife, Cheryl Skinner, in support of Hillegeist rather than his own political activity. The County therefore argues that Skinner is impermissibly "assert[ing] a claim on the basis of another person's constitutionally protected rights." We disagree.

As noted *supra*, Skinner engaged in political activity in support of Hillegeist himself, and he alleged that this activity also motivated Molina's decision not to rehire him. Furthermore, the First Amendment guarantees a right to free association for the purpose of engaging in expressive activity. *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). To the extent that we have concluded that Molina could not constitutionally predicate his decision not to rehire Skinner on the basis of Skinner's own support for Hillegeist, we likewise conclude that Molina could not predicate his decision on the fact that Skinner chose to associate (here through marriage) with a Hillegeist supporter. *See Martinez v. Cotulla Indep. Sch. Dist.*, 700 F. Supp. 17, 19 (S.D. Tex. 1988) (holding that a genuine issue of material fact existed as to whether the plaintiff's support of her husband's political activities was a substantial or motivating factor in the school district's decision to terminate her and therefore that a genuine issue of material fact existed as to whether the plaintiff's termination violated her First Amendment

E. Admission of Testimony from Barbara Smith

The County next contends that the district court erred in admitting testimony from Barbara Smith, a former secretary of Frank Briscoe, an assistant district attorney in Fort Bend County. Smith testified that, on July 21, 1992, she answered a telephone call to Briscoe from Molina during which Molina asked for Briscoe's endorsement in his bid for sheriff. Smith stated that when she informed Molina that Briscoe did not intend to endorse either candidate in the sheriff's race, Molina responded "there was going to be trouble." Smith further testified that Briscoe was fired from the district attorney's office the following day.

The County contends that the prejudicial effect of this testimony substantially outweighed its probative value and that it was therefore inadmissible under Rule 403 of the Federal Rules of Evidence. In support of this contention, the County observes that, on cross-examination, Smith conceded that she did not know why Briscoe was terminated and that she was unaware of any relationship between Molina and Jack Stern, Fort Bend County's district attorney. It therefore argues that Smith's testimony was unduly prejudicial because "Briscoe could have been fired for any number of reasons unrelated to Molina" and "there is no evidence to support the supposition that anyone other than Jack Stern . . . was responsible for Briscoe's termination."

We review a district court's evidentiary rulings only for an abuse of discretion. *Smith v. Isuzu Motors Ltd.*, 137 F.3d 859, 861 (5th Cir. 1998). In determining whether evidence is properly excludable under Rule 403, district courts must be cognizant of the fact that, because Rule 403 operates to exclude relevant evidence, application of the rule

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rights), *aff'd*, 922 F.2d 839 (5th Cir. 1990).

" 'must be cautious and sparing.'" *United States v. Pace*, 10 F.3d 1106, 1116 (5th Cir. 1993) (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979)). We conclude that the district court did not abuse its discretion in admitting Smith's testimony regarding Molina's telephone call to Briscoe's office.

Smith's testimony was relevant in that Molina's statement that "there was going to be trouble" because of Briscoe's refusal to endorse him constituted evidence of Molina's retaliatory intent. Molina's statement to Smith strongly implies that he intended to attempt to make trouble for Briscoe because of Briscoe's refusal to endorse him regardless of whether Molina was actually capable of making trouble for Briscoe. Even assuming that the tendency of Smith's testimony on direct examination to imply that Molina was responsible for Briscoe's discharge rendered this testimony unfairly prejudicial, the County effectively mitigated any unfair prejudice by establishing on cross-examination that Smith was unaware of any relationship between Molina and Stern and that she had no idea why Briscoe was fired. We therefore conclude that the district court did not abuse its discretion in admitting Smith's testimony.

F. Whether the District Court's Award of Attorney's Constituted an Abuse of Discretion

The County contends that the district court erred in awarding the attorneys who represented the Plaintiffs a total of $751,370.75 in attorney's fees in connection with this lawsuit pursuant to 42 U.S.C. § 1988. In this regard, the County contends that the Plaintiffs' request for fees contained vague, conglomerated, and duplicative billing entries. The County also contends that the district court erred in allowing the Plaintiffs to recover fees in connection with Molina's

interlocutory appeal because the Plaintiffs voluntarily dismissed Molina prior to resolution of that appeal by this court en banc.[14]

We review a district court's award of attorney's fees for an abuse of discretion, *see Riley v. City of Jackson*, 99 F.3d 757, 759 (5th Cir. 1996), and we accept the factual findings upon which the district court bases its award of attorney's fees, including the determination of the number of hours reasonably expended on the litigation, unless they are clearly erroneous, *see Louisiana Light & Power Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995). We conclude that the district court's award of attorney's fees in this case does not constitute an abuse of discretion.

With respect to the specificity with which a party seeking attorney's fees must itemize the services for which it seeks recovery, the Supreme Court has stated that "counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983). The Plaintiffs' bill of costs contains daily entries of time expended on the case that adequately describe the activity upon which the time was expended. Moreover, the record in this case reflects that the district court personally conducted an exhaustive line-by-line analysis of the bill of costs submitted by the Plaintiffs in support of their request for attorney's fees and that the court ordered the Plaintiffs' counsel to submit two amended bills of costs

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[14] The County does not contend that the attorney's fee award ($751,370.75) was disproportionate to the amount of damages recovered by the Plaintiffs ($401,109.43, including the jury's awards of mental anguish damages, which we reinstate *infra*). *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 (5 Cir. 1998).

providing more detailed itemizations of certain categories of expenses for which they sought reimbursement. The district court also entered a detailed order explaining its reasons for denying certain categories of costs as unnecessary or duplicative. "[G]iven the district court's familiarity with this case, including the quality of the attorneys' work over a period of several years, we cannot say that the district court clearly erred in refusing to [further] reduce the hours in question for vagueness" or in concluding that the fees that it awarded did not include recovery for duplicative charges. *Kellstron*, 50 F.3d at 327; *see also Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993) ("Due to the district court's superior knowledge of the facts . . . , the district court has broad discretion in setting the appropriate award of attorneys' fees.").

Furthermore, the County's claim that the district court abused its discretion in allowing the Plaintiffs to recover attorney's fees incurred during Molina's interlocutory appeal also lacks merit. In *Cobb v. Miller*, 818 F.2d 1227 (1987), we adopted the Seventh Circuit's reasoning in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), where that court held that

> "all time spent in pursuit of relief for the same illegal conduct should be considered in awarding attorney's fees once the relief sought is obtained, regardless whether the plaintiff has succeeded in obtaining the relief from only some and not all of the defendants named in connection with the conduct."

Cobb, 818 F.2d at 1233 (quoting *Mary Beth G.*, 723 F.2d at 1281). We went on to state that, "so long as the defendants from whom the plaintiff did not obtain relief were not named frivolously, the total time expended on the claim should be

counted" in computing an attorney's fee award. *Id.*; *see also Kellstrom*, 50 F.3d at 327 ("A prevailing litigant may not recover for hours devoted solely to claims against other parties. But when claims against multiple parties share a common core of facts or related legal theories, a fee applicant may claim all hours reasonably necessary to litigate those issues." (citations and internal quotation marks omitted)).

With the exception of their claim for punitive damages,[15] the Plaintiffs asserted the same claims against Molina that they asserted against the County. To the extent that the County's liability in this case is based entirely upon Molina's actions, the Plaintiffs' claims against the County rest on a factual bases identical to the one on which their claims against Molina rested. Given that a panel of this circuit unanimously concluded that Molina was not entitled to qualified immunity from liability for the Plaintiffs' claims, *see Brady*, 58 F.3d at 176, it can hardly be said that the Plaintiffs' joinder of Molina in his individual capacity as a party defendant was frivolous.

We find the County's contention what the Plaintiffs should not be able to recover attorney's fee for the interlocutory appeal because they dismissed Molina

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[15] The County also contends that the Plaintiffs should not have been allowed to recover for discovery expenses incurred in pursuit of their exemplary damages claim because they asserted this claim only against Molina in his individual capacity. However, the Plaintiffs' claim that the bill of costs upon which the district court based its award of attorney's fees includes no costs for discovery relating solely to the Plaintiffs' claim of exemplary damages against Molina in his individual capacity, and the County does not dispute this contention. In our review of the record, we have found no indication that the Plaintiffs sought, or that the district court authorized, recovery of fees incurred in conducting discovery relevant only to the Plaintiffs claim for exemplary damages.

voluntarily prior to our consideration of the appeal en banc unpersuasive. As noted above, the time spent by the Plaintiffs' counsel on the interlocutory appeal constitutes time spent seeking recovery for the same illegal conduct for which the jury found the County liable. Our precedent therefore indicates that the district court could have properly allowed the Plaintiffs to recover for the fees incurred during the interlocutory appeal even if this court had concluded en banc that Molina was entitled to qualified immunity, thereby precluding recovery against him in his individual capacity. *See Kellstrom*, 50 F.3d at 327; *Cobb*, 818 F.2d at 1227. Given that the Plaintiffs could have recovered these fees even if they had lost the interlocutory appeal, we see no reason why they should be precluded from such recovery merely because they dismissed Molina voluntarily.[16] We therefore conclude that the district court did not abuse its discretion in allowing the Plaintiffs to recover attorney's fees for fees incurred during the interlocutory appeal.

G. Plaintiffs' Entitlement to Damages for Mental Anguish

Brady, Chamblee, Evans, Fortenberry, Leach, and Rosas contend that the district court erred in concluding that they were not legally entitled to mental anguish damages. We conclude that the district court correctly granted judgment as a matter of law on this issue.

The Supreme Court has long required that compensatory damages for emotional distress "be supported by competent evidence concerning the injury." *Carey v.*

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[16] It is worth noting that, in dismissing Molina voluntarily, the Plaintiffs actually decreased the legal fees that they incurred at the interlocutory appeal phase and thus reduced the amount recoverable against the County.

Piphus, 435 U.S. 247, 264 n. 20 (1978). Failure to establish "actual injury" with sufficient evidence will result in the award of only nominal damages. *Id.* at 266-67. In *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), this court set out to clarify the level of specificity required under *Carey*.

In *Patterson*, we addressed two separate issues regarding the proof necessary to support mental anguish damages. First, we articulated the level of specificity needed to prove a claim for mental damages under *Carey*. We held that there must be a "specific discernable injury to the claimant's emotional state," *Patterson*, 90 F.3d at 940, proven with evidence regarding the "nature and extent" of the harm, *id.* at 938. We acknowledged that "hurt feelings, anger and frustration are part of life," and were not the types of harm that could support a mental anguish award. *Id.* at 940. And our language describing the specificity standard was unequivocal; that standard must be met before mental anguish damages can be awarded. *See id.* at 938 (holding that plaintiff "must" present such evidence).

Second, we addressed the types of evidence that may be used to clear that hurdle. We observed that in proving mental damages "a claimant's testimony alone *may* not be sufficient to support anything more than a nominal damage award." *Id.* at 938 (emphasis added). We noted that *Carey* requires evidence that "*may* include corroborating testimony or medical or psychological evidence." *Id.* at 940 (emphasis added). Likewise, we turned to the Equal Employment Opportunity Commission's (EEOC) official guideline statement for guidance. EEOC POLICY GUIDANCE No. 915.002 § II(A) (2) (July 14, 1992). That document provides:

> Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. Emotional harm *may* manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm *may* consist of ulcers, gastrointestinal disorders, hair loss, or headaches . . . . The Commission will *typically* require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations.

Id. at 10-12 (footnotes omitted) (emphasis added).

About two months after our decision in *Patterson*, the Fourth Circuit issued its decision in *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996), which is a magnum opus on the evidence needed to support compensatory damages for emotional distress. Just as we did in *Patterson*, the Fourth Circuit used the Supreme Court decision in *Carey* as a beacon for its analysis. *See id.* at 1250. The *Price* court then conducted a comprehensive survey of circuit case law addressing the circumstances in which a plaintiff's own testimony was found sufficient, and the circumstances in which that testimony was found insufficient. *See id.* at 1251. In arriving at its determination that the testimony in *Price* was insufficient, the Fourth Circuit concluded:

> Neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages. In marshaling the evidence necessary to establish emotional distress resulting from a constitutional violation, *Carey* instructs us that "genuine injury" is necessary.

Id. at 1254 (citing *Carey*. 435 U.S. at 264)

In this case, the Plaintiffs' own testimony is the sole source of evidence of mental damages. Brady testified that Molina's refusal to rehire him resulted in marital and family problems. Brady also claimed that he had "spent more time on the couch in the last three years" because he "didn't feel like the same person." Brady's testimony on mental anguish is less than two pages of trial transcript.

Chamblee testified that Molina's failure to rehire him caused him sleeplessness, loss of appetite, and weight loss. He claimed that he "just couldn't accept it mentally," and that he worried over finding another job at age fifty-three. Chamblee's testimony on mental anguish is roughly eleven lines of trial transcript.

Evans testified that his job loss had produced nervousness, sleeplessness, and anxiety. He stated that he had been forced to forego insurance coverage due to his unemployment. He asserted that upon learning of Molina's decision not to rehire him "[he] didn't feel like [he] could perform [his] duties for the remainder of time at the sheriff's department." Evans' testimony on mental anguish is roughly nineteen lines of trial transcript.

Fortenberry testified that the loss of his job had made him "highly upset," prompting him to see a family physician. He asserted that he became concerned that his wife would have to quit college and return to work. He maintained that he had experienced nervousness, sleeplessness, and stress. Fortenberry's testimony on mental anguish is roughly one page of trial transcript.

Leach testified that Molina's failure to rehire him caused nervousness and sleeplessness. He claimed that he

had been forced to leave his home in Fort Bend County to find new employment. He described that travail as not "fun." Leach's testimony on mental anguish is roughly nine lines of trail transcript.

Finally, Rosas testified that he gained roughly 100 pounds during the nine months of unemployment that resulted from Molina's failure to rehire him. He claimed that, like Chamblee, he worried over job prospects due to his age. He described the experience as "the worst thing that ever happened to [him]." He stated that he was "shocked and devastated." Rosas' testimony on mental anguish is roughly two and a half pages of trial transcript.

The Plaintiffs' testimony in this case is too vague and conclusory to support mental anguish damages. References to spending too much time on the couch (Brady), not "accept[ing] it mentally" (Chamblee), being "highly upset" (Fortenberry), and experiencing "the worst thing that has ever happened to me" (Rosas), hardly qualify as evidence of demonstrable emotional distress, as required by *Carey*. Moreover, when the Plaintiffs do refer to specific manifestations of emotional harm--like nervousness, sleeplessness, or stress--they fail to elaborate with any detail. Statements like "[my termination] caused marital problems" (Brady), or "there were sleepless nights" (Chamblee), go completely unexplained with no hint as to the nature or extent or severity of the alleged harm. Conclusory statements give the finder of fact no adequate basis from which to gauge the "nature and circumstances of the wrong and its effect on the plaintiff." *Carey*, 435 U.S. at 263-64. That failure of proof is unacceptable. As aptly stated by the Fourth Circuit, a plaintiff must present evidence of "demonstrable emotional distress, which must be sufficiently articulated; []conclusory statements that the plaintiff suffered emotional distress . . . [do not] support an award of

compensatory damages." *Price*, F.3d at 1254.

Remarkably, in this case not one plaintiff presented medical or psychological expert testimony as to the emotional harm that was purportedly suffered. Similarly, not one plaintiff presented corroborating testimony from a spouse, family member, friend, or coworker, regarding objective evidence of emotional distress, such as crying spells, outbursts of anger, sleeplessness, or excessive sleeping. Not one of these plaintiffs presented any testimony as to the need for or use of prescription or over-the-counter medication to treat their mental upsets. As such, the evidence of mental damages in this case consists solely of the Plaintiffs' own uncorroborated testimony. Given that "emotional distress [is] fraught with vagueness and speculation, [and] is easily susceptible to fictitious and trivial claims," *id.* at 1250, we must "scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony," *id.* at 1251.

The Plaintiffs' testimony is further weakened by the method in which it was elicited. In several instances, the Plaintiffs' testimony consists of simple one-word, yes or no answers to leading questions. To a large extent, it was the Plaintiffs' attorneys, and not the Plaintiffs' themselves, who testified on the mental damages issue. Evans' testimony on direct examination accurately portrays many of the shortcomings we have discussed:

O. Did you have sleeplessness?
A. Yes, I did.
Q. Did you have nervousness?
A. Yes
Q. Did you have anxiety?
A. Pardon?
Q. Did you have anxiety?

A. Yes.

In sum, the Plaintiffs' testimony in this case is vague, conclusory, and uncorroborated. Under *Carey*, *Patterson*, and *Price*, it cannot legally support mental anguish damages.

In reaching our conclusion, we do not now hold, nor have we ever held, that a plaintiff may never prove mental anguish damages with his own testimony alone. In certain cases a plaintiff's testimony alone may be sufficient proof of mental damages. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998) (" *Patterson* recognizes that mental anguish damages . . . [do] not always require that the plaintiff offer medical evidence or corroborating testimony in addition to her own testimony"). *Patterson* does not conflict with that proposition.

Under *Patterson* it does not matter what type of evidence is used to satisfy *Carey's* specificity requirement, so long as that standard is successfully met. When a plaintiff's testimony is particularized and extensive, such that it speaks to the nature, extent, and duration of the claimed emotional harm in a manner that portrays a specific and discernable injury, then that testimony alone may be sufficient.

We recognize that this court has occasionally permitted a plaintiff's uncorroborated testimony to support an award for mental anguish damages. *Migis*, 135 F.3d 1041; *Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996). Both of those cases, however, were decided after *Patterson* and offer slim guidance when attempting to compare "the sufficiency of the testimony in those cases with that in our case, which consists chiefly of one-word responses to leading questions.

We affirm the district court's decision to grant judgment as a matter of law in favor of the County on the mental anguish awards.[17]

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[17] The result reached in Part III.G reflects the view of Judges Garza and DeMoss. Judge King, however, would hold that Brady, Chamblee, Evans, Fortenberry, Leach, and Rosas are entitled to reinstatement of the jury's award of mental anguish damages to them. While the evidence that these plaintiffs presented supporting their entitlement to mental anguish damages is, in many respects, not especially compelling, Judge King would hold that our opinion in *Forsyth*, the benefit of which the district court did not have when it decided to set aside the jury's award of mental anguish damages, compels a conclusion that the jury's award of damages for mental anguish to these plaintiffs was supported by sufficient evidence. The *Forsyth* panel held that a § 1983 claimant's uncorroborated testimony "that he suffered depression, sleeplessness, and marital problems" constituted sufficient evidence to sustain the jury's award of $75,000 in damages for mental anguish. *Forsyth*, 91 F.3d at 774.

Furthermore, Judge King would hold that the prior panel opinion in *Patterson* does not foreclose the result reached in *Forsyth* because *Patterson* held only that some evidence of actual manifestation of mental anguish is necessary to sustain a more-than-nominal mental anguish damages award. *See Patterson*, 90 F.3d at 940. The types of manifestations of mental anguish that *Patterson* indicates will support an award of mental anguish damages include the same manifestations about which the plaintiffs in *Forsyth* and this case testified: depression, sleeplessness, marital problems, stress, and anxiety. *See id.* at 939. Judge King would hold that the testimony on mental anguish in this case is materially indistinguishable from the testimony at issue in *Forsyth* as it is described in that opinion, and the damages awards in this case are much smaller. Judge King would therefore hold that *Forsyth* requires reinstatement of the jury's award of mental anguish damages to Brady, Chamblee, Evans, Fortenberry, Leach, and Rosas.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX C

Kenneth Craig BRADY, et al,
Plaintiff-Appellees,
v.
FORT BEND COUNTY, et,al,
Defendants,

R. George Molina, Defendant-Appellant
No. 94-20067

United States Court of Appeals,
Fifth Circuit.
July 13, 1995,

Order Granting Rehearing En Banc
Aug. 25, 1996

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, DUHÉ and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Sheriff Molina of Fort Bend County appeals a district court's denial of his qualified immunity defense to personal liability for his deputy sheriff rehiring decision. Because qualified immunity is designed to shield from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1996), this court can affirm that judgment only if convinced that the sheriff's (alleged) actions were patently incompetent or intentionally

flouted the law.[1] Hence "(f)or executive officers in general ... qualified immunity represents the norm." *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2782, 73 L.Ed.2d 396(1982). Here, however, Sheriff Molina's actions as pled by the plaintiffs violated law that has been held to have been "clearly established" in the Fifth Circuit at the time he acted. Notwithstanding some persuasive legal points he makes, we are constrained to reject the sheriff's qualified immunity and thus to dismiss his appeal.

The merits of this § 1982 action concern Sheriff Molina's decision not to rehire seven deputy sheriffs after his victory in the 1992 general election. These plaintiffs contend—and we accept for the purpose of appeal that it is true —that they were not rehired because they supported Molina's opponent. They reason that the First Amendment protects them from the sheriff's employing this factor in his appointment decisions.

Superficially, deputy sheriffs would appear to have no such entitlement. Texas state law specifically declares that "Deputy shall serve at the pleasure of the sheriff." Tex.Loc.Gov't Code §85.003(c) (Vernon 1988). And the Texas state courts have routinely refused to interpose any restrictions on the sheriff's personnel policy: "[B]oth the appointment and tenure of the sheriff's deputy depend upon the sheriff's sole discretion." *Commissioners Court of Shelby County v. Ross*, 809 S.W.2d 764, 766 (Tex.App.—Tyler 1991, no writ) (citation omitted). Simply, Texas has adopted a public policy "that officers elected by the people to discharge public trusts . . .should be free to select persons of their own choice to assist them in the discharge of the duties

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[1] This court reviews the denial of qualified impunity. *Pierce v. Underwood*, 487 U.S. 552, 558, 105 S.Ct. 2341,2346,101 L.Ed.2d 420 (1988).

of their office." *Murrey v. Harris*,112 S.W.2d 1091, 1093 (Tex.App.—Amarillo 1938, writ dismissed).

(5) Nonetheless, this court has consistently imposed First Amendment fetters on the discretion of the sheriff.[2] Molina suggests two means for circumventing these constraints. First, he argues that he did not *fire* or *transfer* the deputy sheriffs but merely decided not to reappoint these deputies after the expiration of their terms of office.[3] He suggests that because no case specifically prohibited a sheriff from failing to reappoint deputy sheriffs because of political activity (versus partisan affiliation) he must be protected by qualified immunity.[4] Logically, he posits that the Fifth Circuit's failure to recognize a distinction between a termination (or transfer) and the decision not to reappoint to a term of office that expires by operation of state law renders the state law automatic termination a nullity.

Next , Sheriff Molina calls our attention to the Seventh Circuit's opinion in *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied* 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), which expressly authorized exactly what

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[2] Our court has often considered the scope of constitutional protection accorded deputy sheriffs. *See McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir. 1984)(en banc); Matherne v. Wilson, 851 F.2d 752 (5th Cir 1988); *Garcia v. Reeves County, Texas*, 32 F.3d 200 (5th Cir.1994); *Vajvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995).

[3] When a sheriff's term expires so does the term of each of his deputies. *County of El Paso v. Hill*, 754 S.W.2d 267, 268 (Tex.App.—El Paso 1988, writ denied).

[4] (I)f there is a 'legitimate question' as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity." *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994) (Powell, J) (citation omitted).

Sheriff Molina is alleged to have done here. Surveying the constitutional landscape demarked by the Supreme Court's *Elrod* [5]*—Branti* [6]*—Rutan* [7] First Amendment "patronage" trilogy, the court of appeals concluded that "political considerations are appropriate for determining the qualifications for the position of deputy sheriff." *Id.* at 1210. Most notably, the court held that a sheriff could not have a clear understanding that deputy sheriff's had "any constitutional protection from a politically based discharge." *Id.* at 1214. Other circuits agree with the reasoning in *Upton*. *See Cagle v. Gilley*, 967 F.2d 1847, 1849 (6th Cir. 1992); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989). Molina asserts that it is irrelevant for purposes of qualified immunity that our court does not agree. [8] Quoting the Seventh Circuit, he argues that "such a (circuit) split is indicative of the fact that the deputy sheriff's rights in this regard are currently unsettled as a matter of constitutional law and therefore were not 'clearly established." *Upton*, 930 F.2d at 1217.

Both of Molina's attacks are not without force and cause us concern about anomalies built into Fifth Circuit law. Unfortunately, without re-examination en banc or a shift

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[5] *Elrod v. Burns*, 427, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion).

[6] *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

[7] *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990).

[8] "As far back as 1985, the established law in this circuit has been that a public employer cannot retaliate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker". *Vajvodich*, 48 F.3d at 887.

triggered by the Supreme Court, application of our prior precedent requires us to approve the district court's holding.

II.

Turning first to Molina's proposed distinction between termination and failure to reappoint, rendering meaningless the Texas law's automatic termination of a deputy sheriff's term does prompt a pause.[9] Nevertheless, this court sitting *en banc* in *McBee* announced that the difference between "failure to rehire" deputies and a "dismissal" was irrelevant to the First Amendment analysis. *McBee*, 780 F.2d at 1015. Moreover, our court recently refused to grant significance to the fact that the sheriff department employees " were unemployed by operation of law on January 1, 1993." *Garcia*, 32 F.3d at 204. Both "firing" and "failing to hire" are "triggering personnel decision[s]." *Id.*

If both of those "acts" are equivalent, "(B)y January 1992 at the latest, the law was equally clear that, regardless of whether an employee is a policymaker, a public employer cannot act against an employee because of the employee's affiliation or support of a rival candidate unless the employee's activities in some way adversely affect the government's ability to provide services," *Vajvodich*, 48 F.2d at 867. Although the defense of qualified immunity is

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[9] "If the sheriff had failed to have been reelected because the voters perceived poor performance or inefficiency by his deputies, it would be unreasonable to contemplate that his successor sheriff would reappoint the former deputies who were unqualified in the eyes of the public." *El Paso County Sheriff's Deputies v. Samaniega*, 802 S.W.2d 727, 729 (Tex.App.—El Paso 1990, writ denied). Or as the Seventh Circuit explained: "Given the dependency of the sheriff (and his political survival) on his deputies' job performance, it is understandable why a sheriff might believe that party loyalty is an appropriate consideration for a deputy sheriff."

intended to give[] ample room for mistaken judgments."[10] in this circuit there are no "gray area" of constitutional law left for Molina to take advantage of.

III.

Furthermore, the Fifth Circuit does not permit Sheriff Molina to refer to the views of the other circuits to establish that these prohibitions were not "clearly established." "Our inquiry (into what is clearly established law) ends, if we find from examining the decisions of the Supreme Court and our own decisions that the law was clearly established in this circuit." *Boddie v. City of Columous, Miss*, 989 F.2d 745, 748 (5th Cir. 1983).[11]

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[10] *See Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534,537, 116 L.Ed.2d 589 (1991) (quotation omitted).

[11] It may be wondered whether this is the approach the Supreme Court will ultimately adopt. The Court has avoided confronting the issue at least twice. *See Harlow v. Fitzgerald*, 437 U.S.800,818 n.32, 102 S.Ct.2727, 2738 n.32, 73 L.ed.2d 396 (1981) (As in *Procunier v. Navarette*, 434 U.S. 353, 565,98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978), we need to define here the circumstances under which 'the state of the law' should be evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'") Nevertheless, the Supreme Court had advised the court of appeals that the measure of what is "clearly established" in American law is "objective." *See Anderson v. Creighton* 483 U.S. 635, 640. 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). While it seems peculiar to consider an official action held lawful by one federal circuit court to be "clearly" unconstitutional by any "objective" criteria, such a result reinforces the finality of circuit law, albeit at the expense of immunity in some cases. Perhaps the Supreme Court will ultimately find a *Teague*-like measure (i.e. no reasonable jurists disagree) more apt to compare with the concept of "clearly established law." The Eleventh Circuit *en banc* has already adopted a similar standard. *See Lassiter v. Alabama A and M University*, 28 F.3d 1146,1150 (11th Cir. 1994) (en banc) ("For qualified immunity to be surrendered, preexisting law must dictate, that is truly compel . . .the

[6] Although other circuits analyze deputy sheriffs as a class and conclude that they "operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies,"[12] in this circuit, a public cannot be terminated for exercise of his First Amendment rights unless the sheriff alleges a "disruption of governmental functions." *Vojvodich*, 48 F.2d at 887 (citing *Click v. Copeland*, 970 F.2d 106, 112-113 (5th Cir. 1992) (Sheriff's failure to allege disruption fatal to his claim of qualified immunity)). Indeed, "(a)s far back as 1985, the established law in this circuit has been that a public employer cannot retalitate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker." *Id.* at 887. Accordingly, this panel has no authority to revisit the question. whether partisan affiliation or political activities can ever be proper factors in a personnel decision concerning deputy sheriffs such as allegation of disruption. More importantly, we are left to apply *Vajvodich's* conclusion that our circuit has clearly established this principle as early as 1985.

But the limits of this decision should be made clear. In *Noyola v. Texas Dept. of Human Resources*, 846 F.2d 1021 (5th Cir. 1988), this court approved granting qualified immunity to a government official who was alleged to have fired an employee in defiance of First Amendment standards. The court recognized that in such areas of constitutional law, where case-by-case balancing tests apply, "one consequence ... is [the] implication [of balancing] for the qualified immunity of public officials whose actions are [challenged]"

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conclusion for every like-situation, reasonable government agent, that what defendant is doing violates federal law *in the circumstances*.

[12] *Upton*, 920 F.2d at 1218

846 F.2d at 1025. *Noyola* commented: "There will rarely be a basis for a *priori* judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." *Id.* Except with regard to the line of authority this circuit has developed, for good or ill, regarding the discharge of deputy sheriffs, *Noyola* remains compelling.

Thus, because the denial of qualified immunity by the district court was correct, we DISMISS the appeal.

Before FOLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART and PARKER, Circuit Judges.

ON SUGGESTION FOR REHEARING
EN BANC
Aug. 25, 1995

(Opinion July 13, 1995, 5 Cir.
1995, 58 F.2d 173)

BY THE COURT:

A member of the court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

42 U.S.C.§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia.

TEX. CONST. art.V, § 18 Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court.

(b) Each county shall, in the manner provided for justice of the peace and constable precincts, be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

TEX CONST. art.I § 23 Sheriffs

Sec. 23. There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties, qualifications, perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filed by the Commissioners Court until the next general election.

TEX. LOC. GOV'T CODE ANN.:§ 85.003 Deputies

(c) A deputy serves at the pleasure of the sheriff. However, the appointment of a deputy is revoked on indictment of the deputy for a felony.

(d) A sheriff is responsible for the official acts of a deputy and may require that a deputy execute a bond or other security. A sheriff has the same remedies against a deputy and the deputy's sureties as any other person has against the sheriff and the sheriff's sureties.

§ 151.001 Officer Applies to Commissioners Court for Authority to Appoint Employees

(a) A district, county, or precinct officer who requires the services of deputies, assistants, or clerks in the performance of the officer's duties shall apply to the commissioners court of the county in which the officer serves for the authority to appoint the employees. If the county has a population of more than 190,000, the officer shall apply for the authority to appoint any other kinds of employees.

(b) The application must be sworn and must state:

(1) the number of employees required;

(2) the title of the positions to be filled; and

(3) the amounts to be paid the employees.

(c) If the application is made in a county with a population of more than 190,000, it must also describe the duties to be performed by the employees.

(d) The application must be accompanied by a statement of the probable receipts from fees, commissions, and compensation to be collected by the office during the fiscal year and the probable disbursements, including salaries and expenses, of the office.

(e) This section does not apply to a district attorney or criminal district attorney in a county with a population of more than 190,000.

§ 151.901 Employment of Secretarial Personnel

The commissioners court of a county may enter an order to employ and provide compensation for secretarial personnel for a district, county, or precinct officer if the court determines that the financial condition of the county and the staff needs of the officer justify doing so.

§ 152.01 Amount Set by Commissioners Court

The commissioners court of a county shall set the amount of the compensation, office and travel expenses, and all other allowances for county and precinct officers and employees who are paid wholly from county funds

§ 152.054 Classification of Positions; Salary Schedule

(a) In a county with a population of more than 75,000, the county government shall classify all positions in its sheriff's department and shall specify the duties and prescribe the salary for each classification.

(b) A member of the sheriff's department who is required to perform the duties of a particular classification is entitled to be paid the salary prescribed for that position during the time the member performs those duties.

§ 157.001 Hospitalization Insurance

The commissioners court of a county may provide hospitalization insurance to a county official, deputy, assistant, or other county employee.

§ 157.002 Medical Care, Hospitalization, and Insurance in Counties of 500,000 or More

(a) In a county with a population of 500,000 or more, the commissioners court by rule may provide for medical care and hospitalization and may provide for compensation, accident, hospital, and disability insurance for the following persons if their salaries are paid from the funds of the county or of a flood control district located entirely in the county:

(1) deputies, assistants, and other employees of the county, or of the flood control district, who work under the commissioners court or its appointees; and

(2) deputies and assistants appointed under

Subchapter A, Chapter 151, by county and district officers.

(b) The commissioners court may contract with a county-operated hospital or a hospital operated jointly by a city and county to provide medical care and hospitalization under this section. The commissioners court may, if circumstances warrant, provide for medical care and hospitalization in a private hospital.

Supreme Court, U.S.
FILED
DEC 18 1998
CLERK

No. 98-820

In The

Supreme Court of the United States

October Term, 1998

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

KENNETH CRAIG BRADY; BOBBY LEE EVANS; WILLIAM E. FORTENBERRY; JAMES ARTHUR LEACH; STEPHEN LEON SKINNER; GUY "NUBBIN" CHAMBLEE; and ANTONIO ROSAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

Respondents sued Fort Bend County, Texas, under 42 U.S.C. § 1983 and the First Amendment claiming that the sheriff did not reappoint them as deputies because of their speech and association during the 1992 sheriff's election campaign in Fort Bend County, Texas. The questions presented are:

1. Whether the Fifth Circuit erred in interpreting Texas law to hold that a county is vicariously liable, under *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), and § 1983, for a Texas sheriff's hiring decision.

2. Whether the Fifth Circuit erred under *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), in balancing the free-speech rights of the Respondents against the state's interest in prohibiting such speech, considering the facts of the case and Texas law as it governs the Texas deputy sheriff relationship.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceedings.

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STATEMENT OF THE CASE

Respondents adopt the Fifth Circuit Court of Appeals recitation of the factual and procedural background of this proceeding.[1]

The Petitioner, Fort Bend County, seeks *certiorari* upon essentially two grounds, both of which lack merit. First, it asserts that the Fifth Circuit erroneously interpreted Texas law in deeming a Texas sheriff to be a county's final policy-making official regarding appointment of deputies. In doing so, the Petitioner points to an alleged circuit split which, in fact, amounts to little more than a supposed conflict between long-standing Fifth Circuit precedent and a recent district court opinion from the Middle District of North Carolina. Second, the Petitioner contends that the Fifth Circuit erroneously applied the *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test to the facts presented.

As discussed below, there exists no basis for review in this case. The first ground raised by Petitioner urges this Court to make an exception to its general disinclination to review circuit courts' interpretations of state law, particularly with respect to states within their circuit. *See McMillian v. Monroe County, Alabama*, 520 U.S. 781, ___, 117 S. Ct. 1734, 1737 (1997). Even if this Court were to undertake such a review, it would discover that Texas law

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[1] The opinion of the Court of Appeals is reprinted at pp. 3a through 69a of the Petitioners' Appendix. The opinion is also found in the Federal Reporter. *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998).

uniformly establishes the proposition accepted by the court below. Moreover, Petitioner's argument that it bears no responsibility for its sheriff's unconstitutional conduct is fundamentally inconsistent with arguments it made to the district court; Petitioner, simply put, is estopped to now contend otherwise.

As for the suggestion that a circuit split exists, even a cursory review of the Petition for Writ of Certiorari will reveal that this argument is based not upon a disagreement among circuits, but upon an opinion issued by the U. S. District Court for the Middle District of North Carolina. The Fourth Circuit, which reviewed the trial court's opinion, never even addressed the issue upon which Petitioner bases its circuit split argument. No circuit split exists.

Finally, the Petitioner does not advocate in favor of a new balancing test to replace *Connick-Pickering*, nor should this Court create a new approach. Instead, Petitioner simply claims that the Fifth Circuit incorrectly applied the well-established test to the instant facts. Even if that were true, which Respondents deny, the Fifth Circuit's application of the law to the facts offers no reason, let alone a good one, for review by this Court. Indeed, Petitioner really prays for review because it disagrees with the result, not with the Fifth Circuit's methodology.

Accordingly, the Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The writ should be denied for three reasons:

1. Petitioner seeks review of Texas law, which the Fifth Circuit is uniquely positioned to interpret. The Fifth Circuit's interpretation in this case is consistent with its prior recitations of Texas law, the Texas courts' view, the Texas Attorney General's opinion, and even with Petitioner's own arguments to the District Court.

2. There is no circuit split.

3. Petitioner seeks review of the Fifth Circuit's application of the *Connick-Pickering* balancing test to the particular facts presented, but in no way claims that a different test should apply. The writ should be denied, then, because Petitioner simply seeks relief from the result, not from the Fifth Circuit's application of the law.

I. TEXAS LAW HOLDS THAT A SHERIFF IS A COUNTY POLICYMAKER; THE PETITIONER, THEN, SEEKS NOTHING MORE THAN TO REVERSE THE FIFTH CIRCUIT'S INTERPRETATION OF STATE LAW

In its first question presented for review by writ of certiorari, Petitioner seeks review of the Fifth Circuit's interpretation of Texas law, that is, whether the sheriff acts as a final policymaking official regarding the reappointment of deputies for Texas counties. Virtually no controversy exists among the courts regarding this question of Texas state law, and Texas law is replete with

references to sheriffs being county officers. *See e.g.*, TEX. CONST. ART. V, § 23; *Abbott v. Sheriff Pollock*, 946 S.W.2d 513 (Tex. App. – Austin 1997, no writ). Moreover, every court to address this issue, whether state or federal, has held that Texas sheriffs are final policymakers for the county which they serve. *See, e.g., Turner v. Upton County, Texas*, 915 F.2d 133 (5th Cir. 1990). *See also Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996).

Under Texas law, deputies serve "at the pleasure of the sheriff." Texas Loc. Gov't Code § 85.033(c). As the Fifth Circuit noted below, sheriffs in Texas are not merely delegated discretion to hire and fire deputies, their choice is unreviewable by any county body or official.[2] *See id.*,

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[2] Petitioner apparently assumes that there can only be one final policymaking official for the County. Of course, there may be more than one final policymaking official for the County depending on the conduct at issue. While, for example, the County Commissioners may be the final policymaking body for some County decisions, the Sheriff is the final policymaking official for hiring decisions within the Sheriff's Department. *See e.g.*, Plaintiff's Exhibit No. 16 p. SRS0406 (Sheriff's Dept Policy Manual: Personnel policies are set entirely by Sheriff without input from County Commissioners). That the County Commissioners have final policymaking power over *other* County decisions, in no way undercuts the Sheriff's policymaking role regarding his department. The Sheriff is simply an independent final policymaking official whose policy making covers the Sheriff's Department. This Court has acknowledged as much in *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, ___, 117 S. Ct. 1382, 1390 (1997). In *Brown*, this Court noted:

> The County sought to avoid liability by claiming that its Board of Commissioners participated in no policy decisions regarding the conduct and operation of the Office of the Bryan County Sheriff. *Id.* at 32.

§ 151.004; *see also Murray v. Harris*, 112 S.W.2d 1091 (Tex. Civ. App. – Amarillo 1938, writ dism'd); *Commissioners Court v. Ross*, 809 S.W.2d 754, 756 (Tex. App. – Tyler 1991, no writ). This formulation yields the inescapable result that a Texas sheriff acts for the county whose citizens elected him. *Bennett*, 74 F.3d at 586.

By that same token, as the Texas Attorney General recently confirmed, Texas law provides that a suit against the sheriff in his official capacity is nothing more than a suit against the County. Texas Attorney General Opinion Letter No. 98-103 (1998). The Fifth Circuit has likewise interpreted Texas law. *Bennett*, 74 F.3d at 584 ("Ms. Bennett's suit against the Sheriff in his official capacity is a suit against Archer County directly in everything but name"). And crucially, that is precisely the position that the County took below, when it urged the district court to dismiss the Sheriff as an official-capacity defendant on the grounds that such a suit was nothing more than a suit against the County.[3]

> Accepting the County's representations below, then, this case presents no difficult questions concerning whether Sheriff Moore has final authority to act for the municipality in hiring matters. (citations omitted).

Accordingly, it is precisely because no other municipal body or official, including the County Court of Commissioners, can impose any restraints on the Sheriff in making his hiring decisions, that the Sheriff is the final policymaking official regarding his hiring decisions.

[3] At one point in the litigation, the Sheriff of Fort Bend County, in his individual and official capacity, was a party along with Petitioner. Both parties were represented by Petitioner's counsel of record. Respondents later dismissed the Sheriff in his

A. This Court normally does not review appellate decisions regarding state law.

These issues, of course, pertain only to Texas state law. This Court has consistently emphasized that the issue of whether a particular official has final policymaking authority is a question of state law. *See McMillian*, 520 U.S. at ___, 117 S. Ct. at 1737; *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion); *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). It is well established that this Court does not normally review issues of state law which have been determined by the

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individual capacity but not in his official capacity. Afterwards, the County moved to dismiss the Sheriff in his official capacity arguing that a suit against the County joined with an action against the Sheriff in his official capacity was redundant because the Sheriff and the County were the same:

> the claims remaining are only claims against Fort Bend County sued in two forms, as an entity, and through the office of the Sheriff. Such claims are clearly redundant as cited in all the authority set forth in the County's motion.

See Respondents' Appendix, p. 3. Later, the County added:

> the wording of 42 U.S.C. § 1983 in no way "compels" Molina to be included as a party defendant, and has absolutely no substantive effect on the Plaintiffs' claims in that it only includes his office, not his person.

See Respondents' Appendix, p. 4. Accordingly, the County (not the Sheriff, R. George Molina) moved for dismissal of "any claims against R. George Molina in his official capacity, the office of sheriff, as duplicitous of the claims against Fort Bend County." *See* Respondent's Appendix, pp. 4-5. The district court granted the County's motion and dismissed the sheriff in his official capacity.

Courts of Appeals. *See Equality Foundation of Greater Cincinnati, Inc., et al. v. City of Cincinnati, et al.*, ___ U.S. ___, 119 S. Ct. 365 (1998) (Justice Stevens respecting the denial of the petition for a writ of certiorari); *Bishop v. Wood*, 426 U.S. 341, 346-47 (1976). This Court, then, should follow its tradition of leaving interpretations of state law to the circuit courts. The Petition for Writ of Certiorari should be denied.

B. This Court normally defers to the judgment of the appellate court concerning state law within its jurisdiction.

Moreover, this Court normally "defer[s] considerably" to the judgment of appellate courts when they construe state law within their jurisdiction. *McMillian*, 520 U.S. at ___, 117 S. Ct. at 1737; *see also Jett v. Dallas I.S.D.*, 491 U.S. 701, 738 (1989) ("[W]e think the Court of Appeals [for the Fifth Circuit], whose expertise in interpreting Texas law is greater than our own, has a better position to determine whether [the school district superintendent] possessed final policymaking authority in the area of employee transfers."); *see also Pembaur*, 475 U.S. at 484 ("We generally accord great deference to interpretation application of state law by the Court of Appeals."). This deference is especially applicable here where each of the Fifth Circuit panel members are based in Texas.

This Court should therefore defer to the Fifth Circuit's conclusion that Texas law makes Texas sheriffs final county policymakers with respect to appointment of deputies. The Petition for Writ of Certiorari should be denied.

II. THERE IS NO CIRCUIT SPLIT REGARDING THE STATUS OF A TEXAS SHERIFF AS A COUNTY POLICYMAKER.

A. There is no circuit split because the law regarding sheriffs varies from state to state.

Petitioner argues that there is a split in the circuits regarding the issue of whether the sheriff is a county policymaker. In suggesting, first of all, that the Fourth Circuit has held to the contrary, Petitioner overlooks the dependence on state law in resolving this issue. With respect to the sole issue in this case, whether under Texas law a Texas sheriff is a county policymaker, no court has ever held that a Texas sheriff exercising any duty, whether it be responsibility for the jail or making employment decisions for deputies, is anything but a county policymaker. Significantly, Petitioner offers no authority to the contrary, let alone another circuit court holding that the Fifth Circuit's interpretation of Texas law is incorrect.

B. Petitioner claims that an ambiguous holding of a district court regarding North Carolina sheriffs constitutes a circuit split.

Even if one ignored the crucial role that state law plays in resolving this issue, there still is no circuit split. Contrary to Petitioner's suggestions, the Fourth Circuit's opinions in no way support its arguments. Strangely, the case that forms the basis of Petitioner's argument that a circuit split exists is a district court opinion, *Harter v. Vernon*, 953 F. Supp. 685 (M.D.N.C. 1996), *aff'd*, 101 F.3d 334 (4th Cir. 1996). Although the Petitioner notes that the

district court's opinion was affirmed by the Fourth Circuit, it fails to advise this Court that the cited portion of the trial court's opinion was neither appealed nor reviewed by the Fourth Circuit. In fact, the Fourth Circuit's opinion concerned only a denial of the sheriff's qualified immunity. The plaintiffs in *Harter* did not cross-appeal the district court's rulings regarding the sheriff's policymaker status, and the appellate court did not reach that issue. *Harter*, 101 F.3d at 336.

In fact, the Fourth Circuit noted that the district court granted summary judgment "explaining that, in its view, Vernon [the sheriff] 'was not acting pursuant to a policy of the county' and 'under state law the sheriff is not an agent of the county in employment decisions.' " *Harter*, 101 F.3d at 336. The Court then expressly noted that:

> the Eleventh amendment ruling is the only issue presented for our review. We do not address, and we express no opinion as to the correctness of, any of the district court's other holdings.

Id.

In the other Fourth Circuit case cited by Petitioner, *Greensboro Professional Firefighters Assoc. v. Greensboro*, 64 F.3d 962 (4th Cir. 1995), the court merely held that a North Carolina *fire chief* lacked final policymaking authority over employee/employer relation decisions, a role it deemed was reserved for City Council and the City Manager. That a different state vests a different sort of municipal authority with a different body or officer in no way speaks to the Texas law question presented in this case. The Fourth Circuit's opinion, then, is neither controversial nor indicative of a circuit split. In short, there

exists no appellate case from any circuit which is any way inconsistent with the opinion below.[4]

In short, the issues regarding the sheriff's policy-maker's status are routine and well-established. There is no controversy among the Courts of Appeals and the Petition for Writ of Certiorari presents no novel issue. It should be denied.

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[4] Interestingly, Petitioner also claims that there exists an intra-circuit conflict and cites the Fifth Circuit opinion of *Gunaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995), as a holding contrary to the opinion below. This is truly a red-herring, however. First, *Gunaca* involved a district attorney and not a sheriff. Second, the Fifth Circuit is well-situated to regulate internal inconsistencies among its decisions. In this case, the Fifth Circuit denied rehearing *en banc*. *See* Petitioner's Appendix, p. 2a. The Fifth Circuit apparently disagreed with any suggestion that its opinion in this case conflicted with its other precedents. Third, Petitioner fails to mention that *Gunaca's* author served on the underlying panel in this case. Surely, that panel possesses great expertise in interpreting its court's law, especially when one of its members wrote the opinion that Petitioner claims is inconsistent. Finally, the Fifth Circuit expressly considered this claim and rejected it, noting that *Gunaca* does not control the issues in the *Brady* case. *Brady*, 145 F.3d at 700, n. 2. Of course, a fair reading of *Gunaca* indicates the same. The other case cited by Petitioner in this regard, *Williams v. Bagley*, 875 S.W.2d 808 (Tex. App. – Beaumont 1994, no writ), offers no support for Petitioner's arguments. In fact, *Williams* confirms that the sheriff is a county official.

III. THE *CONNICK-PICKERING* BALANCING TEST IS WELL ESTABLISHED AND THERE IS NO NEED TO CONDUCT ANOTHER REVIEW OF THE FACTS UNDER THIS TEST

The County does not dispute that the *Connick-Pickering* balancing test applies to the underlying factual setting where public employees complain that they were fired because of political speech. There seems to be little dispute that both the District Court and the Court of Appeals applied the *Connick-Pickering* balancing test to the underlying facts. Instead, Petitioner asks this Court to re-examine the application of the *Connick-Pickering* balancing test to these specific facts. The jury heard two weeks of evidence in this case, most of which related to facts relevant to the *Connick-Pickering* balancing test. The District Court re-examined these facts and applied the *Connick-Pickering* test pursuant to post-trial motions. The Fifth Circuit then affirmed after conducting its own exhaustive and thorough review of the facts under the same test. Petitioner now seeks a fourth review of these facts pursuant to *Connick-Pickering*.

Even if this Court were inclined to conduct yet another fact-intensive *Connick-Pickering* review, this case is not the proper one to review. Under the balancing test, of course, the County's interest in promoting harmony and efficiency in employment must ultimately be balanced against the employees' free speech rights. In this case, however, the record reflects little government interest, if any, in squelching the public employees' free speech rights. The policymaking decisionmaker in this case, the Fort Bend County Sheriff, testified very clearly that there existed no legitimate governmental interest in

failing to rehire the Respondents, or any other person, because of their political speech. *Brady*, 145 F.3d at 710. He further confirmed that a deputy's political speech and campaign activities against him would not present any problem in working under him at the Sheriff's Department. *Id.* This testimony, recited at length in the Fifth Circuit's opinion, typifies the uniformity of opinion from the jury to the Fifth Circuit regarding the test's application in this case.

Put simply, Respondents' rights to free speech overwhelmingly outweighed what little interest the government had in prohibiting such speech. Even the government actor, the Sheriff, was hard-pressed to state why, if at all, the government had an interest, let alone one outweighing Respondents' rights. The state interest in promoting harmonious and efficient employment was not furthered by making decisions based upon political activities because the Sheriff, himself, confirmed that those activities would not affect a deputy's ability to perform harmoniously and efficiently.

Most notably, Petitioner ignores the lack of any legitimate governmental interest in failing to rehire Respondent public employees because of their speech. Accordingly, there is nothing for this Court to re-evaluate that has not already been exhaustively analyzed by the Court of Appeals.

In short, Petitioner simply does not like the result and wishes to have this Court reapply the same test to reach a different result. It does not ask this Court to change the test. Since the test applied below is the proper one, there is no good reason for this Court to consider a case in which the overarching legal principles are already established and sound.

IV. THERE IS NO CIRCUIT SPLIT REGARDING THE BALANCING TEST; THERE ARE ONLY VARYING RESULTS BECAUSE OF A WIDE VARIETY OF FACT PATTERNS AND STATE LAW ISSUES PRESENTED.

The alleged "circuit split" in the decisions cited by the Petitioner is illusory. The *Elrod-Branti* political patronage test[5] and the *Connick-Pickering* political speech test are both fact and state law intensive. Under such tests, it is not surprising that varying results would be reached.

First, the character, content, mode and method of the employee's speech must be carefully examined. The fact-intensive inquiry regarding the public concern inherent in the speech, as well as the countervailing threat to efficient job performance that the speech raises, are critical factors to these tests. Moreover, the factual details regarding the employee/employer relationship are crucial. Often, as it was in this case, the relationship will be governed by state law. It surely cannot be said that there exists any uniformity of the sheriff's position in all fifty states. As this Court has already recognized, there are different forms of county government in different states therefore, "it is entirely natural that both the role of sheriffs and the importance of counties vary from state to state . . . " *McMillian*, 520 U.S. at ___, 117 S. Ct. at 1742.

For example, in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 881 (1998), the

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[5] *See Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion), and *Branti v. Finkel*, 445 U.S. 507 (1980).

Court specifically based its decision on North Carolina law and the role of North Carolina sheriffs.[6] *Jenkins*, 119 F.3d at 1163. The Fifth Circuit, in reviewing the circumstances underlying this case, thoroughly reviewed Texas law as it applies to sheriffs and to sheriff's deputies, in addition to thoroughly examining the speech engaged in by the Respondents.

None of the other cases cited by Petitioner present any conflict with the Fifth Circuit's opinion. In fact, the cases cited by the Petitioner do not even support its argument. Strangely, the Petitioner boldly states to this Court that the Fifth Circuit's opinion is in "square conflict" with the Sixth Circuit. In no case, however, has the Sixth Circuit ever held that sheriff's deputies do not enjoy first amendment protections. In fact, quite the opposite is true. *See Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997).

The Sixth Circuit case cited by the Petitioner, *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992), does not even suggest such a proposition. In *Cagle*, the court held that the sheriff, in his individual capacity, enjoyed qualified immunity because the law as of the time the hiring decisions were made was not clearly established. *Cagle*, 957 F.2d at 1350. Importantly, the Court did not dismiss the plaintiff's case against the sheriff in his official capacity and, in fact, remanded for further proceedings on that issue. Nowhere in *Cagle* may be found the proposition that no first amendment right exists.

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[6] This Court denied review of the *Jenkins* case earlier this year. Of course, the alleged "circuit-split" existed then as much as it supposedly does now. In fact, no such split exists.

Furthermore, the Eleventh Circuit's opinions in this regard reflect the same balancing approach that the Fifth Circuit has used. Petitioner cites the Eleventh Circuit's opinion of *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), as holding that a deputy sheriff has no First Amendment right according to the Eleventh Circuit. Actually, in *Terry v. Cook*, the Eleventh Circuit held that, under Alabama law, given the legal relationship between sheriffs and deputies, those deputies did not enjoy political patronage protection. However, the Eleventh Circuit has also held that deputies in other states, such as in Georgia, do have First Amendment protection. *Brett v. Jefferson County*, 123 F.3d 1429, 1432 (11th Cir. 1997). Importantly, however, the Court did not hold that sheriff deputies, as a rule, enjoy no first amendment protection. *See also Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992). The Eleventh Circuit has never recognized this as any kind of intra-circuit "split" nor should it, given the myriad of possible fact situations involving sheriff's deputies. Of course, this is because each case must be examined under its own specific facts as has been well established by this Court, and therefore, given different factual settings, different results occur.

The Petitioner points to the Seventh Circuit's decision in *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), but that, too, was a qualified immunity case. The case does contain dicta to the effect that the deputy's relationship with the sheriff was so close that they should be considered policymakers under *Elrod-Branti*. That dicta, however, results from a factual inquiry, as well as the legal nature of the sheriff/

deputy relationship under Illinois law. Morever, the dicta was unnecessary to the final decision.

In *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993), where the Seventh Circuit specifically denied the claims of deputy sheriffs under the First Amendment, the court specifically analyzed the employees' speech noting, in support of its result, a number of peculiarities about the state and the counties in which the plaintiffs filed their lawsuit, as well as noting the fact-dependent "aggressive" nature of the employees' speech. Likewise, the court pointed to the existence of a local collective bargaining agreement which provided that only probational deputies could be discharged for political reasons. The court also noted that the employee's "aggressive" patronship at the tavern suggested his presence in the sheriff's department would not foster the necessary cooperation among the approximately 15 deputies, the chief deputy and the sheriff of Price County. Factually, then, the Seventh Circuit's application of the legal test in *Heideman* is readily distinguished from the underlying facts, in which none of the Respondents, contrary to Petitioner's suggestion, engaged in openly hostile speech towards the sheriff of Fort Bend County.

To be sure, none of the cases cited by Petitioner are in square conflict with the Fifth Circuit's opinion here nor, to the extent any conflicts exist, do they result from more than the application of well-settled law to the specific facts presented. In this regard, again, it should be noted that because the court is applying a balancing test, the same court has reached different results even for the

same position. This, however, does not amount to a conflict in federal law between the Circuits.[7]

Finally, to the extent there could possibly be any conflict even in the courts' interpretations governing widely divergent factual situations, this case presents very little in the way of evidence supporting the state's balancing test. In this case, the Sheriff of Fort Bend County who decided not to reappoint the Respondent deputies specifically testified that no deputy needed to support him in order to perform his job and suggested no disharmony that would result as a result of supporting the other candidate. *See Brady*, 145 F.3d at 710. Moreover, in this regard, it was Petitioner's argument at trial that the Sheriff of Fort Bend County did not make decisions based upon political affiliation or political speech at all.

Given the above factual setting, it can hardly be argued that the County had a compelling need to have deputies who politically supported the winning sheriff in the electoral campaign. While arguably, in other factual settings, another sheriff might have an interest in terminating a deputy because their speech causes disharmony, no such allegation was made here.

This is surely not a proper case for review, then, because the evidence of any state interest borders between scant and nonexistent. The Petition for Writ of Certiorari should be denied.

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[7] At most, this would involve a conflict between courts applying arguably similar facts or a conflict regarding the interpretation of *state law*.

Dated: December 18, 1998.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

KENNETH CRAIG BRADY, ET AL	§	CIVIL ACTION NO. H-93-441
vs.	§	JURY TRIAL DEMANDED
FORT BEND COUNTY and R. GEORGE MOLINA	§	

FORT BEND COUNTY'S REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Defendant, Fort Bend County, files this Reply to the Plaintiffs' Response to the Defendants' Motion to Dismiss the Plaintiffs' Newly Added Claims in the Plaintiffs' Fourth Amended Complaint, and would show in support as follows:

1. Plaintiffs don't dispute that they included in their Fourth Amended Complaint a number of claims which are completely unrelated to their political retaliation claim, including claims of deprivation of due process, liberty interest, and denial of equal protection, and apparently have agreed to amend their Fourth Amended Complaint to dismiss such claims. Inexplicably, at the same time, Plaintiffs suggest in their usual overstated and disingenuous fashion that they find the requested dismissal a "surprise to Plaintiffs because, they have no, and are not, asserting any liberty interest claim or claim arising under the procedural due process clause of the Fourteenth Amendment."

2. Perhaps, due to the overzealous advocacy of their attorneys, the Plaintiffs present the somewhat ridiculous notion to this Court that the Defendant should allow the Plaintiffs to include claims of a completely different character than the ones they intend to pursue within the body of their complaint, and that any motion to dismiss such claims would be "wholly frivolous"! Equally perplexing is the notion advanced by the Plaintiffs that it is improper for the County to complain of newly added claims in the Plaintiffs Complaint after the motion cut-off deadline (suggesting that they were free to amend their complaint in any manner they chose following the Court's most recent Order of Consolidation). The County accepts the Plaintiffs' stipulation that no liberty interest, due process or equal protection claims are being asserted in this litigation.

3. Plaintiffs further claim that they previously alleged termination due to partisan affiliation. With respect to the motion to dismiss partisan affiliation claims, the Plaintiffs did not contest the Fifth Circuit's understanding, the Court in its order on the Defendants' Motion for Summary Judgment, and that of the undersigned, that no complaint was made whatsoever as to partisan affiliation (versus political activity). *Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995). It was, of course, admitted that Plaintiff Rosas had made such a complaint. However, the Defendant now stands partially corrected based upon the few paragraphs among hundreds contained within the previous complaints which suggest that Plaintiffs were terminated as a result of their affiliation with the Republican party. The Complaints are attached to the

Plaintiff's Response. Defendants submit that no such claim has been adequately stated.

4. Finally, however, the Defendant moves for dismissal of the claims against Molina in his official capacity. Plaintiffs single out a decision cited by the County which they contend is inapplicable since it deals with the ability to sue state officials rather than county officials under §1983. By doing so, the Plaintiffs miss the point. Undisputedly, the claims against Molina in his individual capacity have been completely dismissed from this lawsuit. Therefore, the claims remaining are only claims against Fort Bend County sued in two forms, as an entity, and through the office of the Sheriff. Such claims are clearly redundant as cited in all the authorities set forth in the County's motion.[1] Apparently, Plaintiffs wish to suggest to the jury that Molina is a Defendant in the instant lawsuit when he is not. There is absolutely no basis for the duplicitous claims, and to prevent confusion to the jury and prejudice to the Defendant, Fort Bend County, the redundant claims against Molina should be dismissed.

5. The Plaintiffs want to have their cake and eat too. They dismissed Molina soley [sic] for the purpose thwarting the Fifth Circuit's jurisdiction over the appeal, foregoing any claim to punitive damages, or damages from Molina. However, they wish to keep him in as a named

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[1] *Stump v. Gates*, 777 F.Supp. 808, 816 (D.C. CO 1991) ("Therefore, although some courts have overlooked it, naming a municipal department as a defendant is not an appropriate means of pleading a §1983 action against a municipality . . . naming either is sufficient. Naming both is redundant.").

Defendant apparently so that they can inform the jury that he is a Defendant when he is not. The wording of 42 U.S.C. §1983 in no way "compels" Molina to be included as a party defendant, and has absolutely no substantive effect on the Plaintiffs' claims in that it only includes his office, not his person.

6. Of course, a pleading from the Plaintiffs in this case would be incomplete without a suggestion of dilatory motive on behalf of the Defendant. Of course, as usual, there is no reason to infer any such intent.[2]

7. For these reasons, the Defendant, Fort Bend County, prays that this Honorable Court dismiss all claims within the Plaintiffs' Fourth Amended Complaint beyond those relating to retaliation and violation of the Fist [sic] Amendment based on political activity alone, and further any claims against R. George Molina in his official

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[2] It is truly a novel concept that the prosecution of an interlocutory appeal, particularly where the Fifth Circuit has granted the issues *en banc* consideration, is a dilatory tactic. No other action taken by the Defendants has suggested any intent to delay the trial of this matter, nor in fact cause any such delay. The Defendants have never moved for a continuance of the trial setting nor suggested any such intent. Plaintiffs' misleading suggestions should not be rewarded or given any legitimacy through their repetition or the vigor with which they are stated.

capacity, the office of sheriff, as duplicitous of the claims against Fort Bend County.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record by certified mail, return receipt requested, hand-delivery, and/or facsimile transmission, on this 7th day of December, 1995, as follows:

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Supreme Court, U.S.
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JAN 8 1999
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(3)

No. 98-820

In The

Supreme Court of the United States

October Term, 1998

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

KENNETH CRAIG BRADY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. RESPONDENTS ARE INCORRECT IN ARGUING THAT THIS CASE INVOLVES ONLY ONE STATE'S LAW.

A. That this case involves an interpretation of Texas substantive law, which is similar to the law of numerous other states, does not preclude certiorari.

Respondents' first argument, that Petitioner seeks nothing more than to reverse the Fifth Circuit's interpretation of Texas law, ignores the plethora of other states which have enacted laws similar, if not identical, to Texas regarding the authority of officials to make appointments. (Pet. for Cert. at 11). Citing *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 117 S.Ct. 1734 (1997), Respondents urge this Court to turn the other cheek and defer to the Court of Appeals' interpretation of state law. However, such concerns obviously did not prevent this Court from granting certiorari in *McMillian*, in which the Court interpreted Alabama law in determining whether the county sheriff acted for the state or the county. Thus, Respondents' first argument does not support denial of certiorari in this case.

B. The conflict between the Fifth and Fourth Circuits is not fact-sensitive. It is a clear conflict of legal interpretation.

The County is in complete agreement with Respondents' statement of the letter of Texas law. The issue before this Court, however, is the effect of that law, and numerous similar laws throughout the country, on county

or municipal liability for an official's appointment decisions. Respondents do not substantively address this issue anywhere in the entire Brief in Opposition.

The Fourth Circuit's opinion in *Greensborough Prof. Fire Fighter's Assoc. v. City of Greensborough*, 64 F.3d 962 (4th Cir. 1995), varies from this case in one respect: it involved the appointment decisions of a fire chief instead of a sheriff. That single difference is immaterial to the clear circuit split on the compelling legal issue. *Greensborough* shows that a fire chief's appointment authority under North Carolina law is comparable to the appointment authority possessed by Sheriff Molina here. Indeed, as discussed, *infra*, the Fourth Circuit, sitting en banc, has also rejected liability in the context of a sheriff's appointment decisions. *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 881 (1998). Strikingly absent from Respondents' Brief is a substantive attempt to distinguish *Greensborough* on the merits. Instead, Respondents assert that it should be disregarded only because it involves a state other than Texas. Such an argument only emphasizes the County's point as to the nationwide importance of the issue and further supports why certiorari should be granted here – other states have similar laws which cause the same type of disputes as those involved here.

At its most fundamental level, Respondents' Brief is urging this Court to accept the Fifth Circuit's tacit embracing of *respondeat superior* liability in the context of § 1983, a theory this Court has repeatedly rejected. (*See* Pet. for Cert. at 13, 21). The reality of the situation, though sometimes harsh, is that deputies similarly situated to Respondents will have to sue the sheriff directly.

Ultimately, deputies might not obtain money damages, but they may be entitled to reinstatement or other equitable relief.[1]

C. The County's position on appeal does not conflict with its arguments below.

Respondents have sheepishly contended that the County is estopped from arguing against county liability because it moved the district court to dismiss the sheriff in his official capacity after Respondents voluntarily dismissed the sheriff individually. (Brief Opp. at pp. 5-6). This argument is frivolous. In the trial court, after Respondents dismissed the sheriff in his individual capacity, they attempted to amend their complaint to raise numerous new allegations. The County moved to dismiss those claims, and in its reply to Respondents' response to that motion, the County urged the court to dismiss Sheriff Molina in his official capacity because that claim was merely duplicative of the claims asserted against the County. The only parties in the suit at that time were Fort Bend County and Sheriff Molina in his official capacity. The County merely urged the court to dismiss Molina in his official capacity to prevent confusion to the jury and eliminate redundant claims. At no time in the trial court did the County expressly or impliedly take the position that it *could* be liable for Molina's appointment decisions. In fact, it expressly asserted, based on this Court's holdings, that it could not be liable

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[1] However, whether the sheriff is entitled to indemnity from a county, as he was here, is not determinative of whether the county is a proper party to the suit.

because the sheriff was not the County's final policy-maker. That the County moved the court to dismiss Molina in his official capacity involves a narrow, and distinct, issue and is not in conflict with the positions urged by the County here.

Also, it is interesting that Respondents waited until this stage of the proceedings to make such an argument instead of promptly urging it in the Fifth Circuit. Had Respondents raised that issue in the Court of Appeals, the Fifth Circuit would have had the opportunity to address it. As the record stands now, Respondents have waived their "estoppel" argument.

II. RESPONDENTS SUGGEST THAT JUDGE EDITH JONES WAS WRONG WHEN SHE IDENTIFIED, IN A PUBLISHED OPINION, THE EXISTENCE OF A CONFLICT AMONG THE CIRCUITS. SHE WAS NOT WRONG.

In Judge Edith Jones' published opinion resulting from the interlocutory appeal, she noted the existence of other circuit opinions which have "expressly authorized exactly what Sheriff Molina is alleged to have done here." *Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995) (Pet. for Cert. at App. 64a-65a). In her opinion, Judge Jones expressed a desire for the en banc Fifth Circuit to re-evaluate its alignment with other circuits on the issue, *Brady*, 58 F.3d at 175 (Pet. for Cert. at App. 65a-66a); and the court clearly intended to do so when it granted the County's suggestion for rehearing en banc. This review was avoided only by Respondents' prompt dismissal of

their claims against the sheriff, individually, after rehearing en banc was granted. Respondents, however, are apparently of the impression that Judge Jones was wrong.

Highlighting the conflict is the Fourth Circuit's en banc decision in *Jenkins*. *Jenkins*, 119 F.3d at 1156. Indeed, the Fourth Circuit itself was at odds over the outcome of *Jenkins*, as indicated by the dissenting opinions filed. *Jenkins* is on point. Respondents' paltry attempt to distinguish it again hinges on the mere fact that it involves North Carolina law. Thus, Respondents miss the point entirely (or attempt to evade it) because it is apparent from the *Jenkins* opinion that North Carolina law is identical to Texas law concerning the appointment authority of sheriffs. Additionally, Respondents make no attempt to distinguish *Jenkins* factually.

In *Upton v. Thompson*, 930 F.3d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), the Seventh Circuit approved a sheriff elect's decision to discharge several deputies who had opposed the sheriff's party affiliation. The case involved Illinois law, which notably provided that deputy sheriffs are subject to at-will dismissal by the sheriff. *Id.* at 1210. Here, as set forth in the County's Petition for Writ of Certiorari, Texas law (and the law of so many other states) provides that deputies serve at the sheriff's pleasure. The *Upton* court concluded, among other things, that political considerations are an appropriate requirement for the effective performance of a deputy sheriff and that deputy sheriffs operate with "a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Id.* at 1218.

Additionally, Respondents' attempt to convince the Court that *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), does not contribute to the clear circuit conflict is mysterious considering that Respondents expressly acknowledged that *Terry*, in fact, held that sheriff's deputies did not enjoy political patronage protection. (Brief Opp. at 15). In *Terry*, deputy sheriffs sued under § 1983 claiming that they had been discharged, or not re-appointed, for political reasons. *Id.* at 374. The Eleventh Circuit affirmed the dismissal of the deputies' § 1983 claims and in so doing analyzed the statutory powers of sheriffs and deputies under Alabama law, which are consistent with the law in Texas. "We can find no less restrictive means for meeting the needs of public service in the case of sheriff's deputy than to acknowledge a sheriff's absolute authority of appointment and to decline to reinstate those who did not support him." *Id.* at 377. This is flatly contrary to the Fifth Circuit's conclusion in this case.

The cases cited by Petitioner, which are at odds with the Fifth Circuit, do not represent a fact-bound application of law because they involve identical law and very similar facts. Because they reach diametrically opposed results by way of reasoning which is clearly contrary to the Fifth Circuit's analysis here, they are not fact-sensitive cases. Rather, the County's argument emphasizes an ongoing problem within several circuits, which impacts uniformity in every day practice at the district court level. The problem has yet to be clearly and squarely resolved.

CONCLUSION AND PRAYER

Respondents' Brief in Opposition raises no credible grounds for denying certiorari. It fails to meet head on the critical issues in the case and instead resorts to misleading attempts to characterize the issues in this case as only involving Texas state law and a frivolous estoppel argument. Because the cases cited by the County demonstrate that the problems raised in the instant matter continue to persist on a nationwide scale, this Honorable Court should grant the petition for writ of certiorari.

Respectfully submitted,

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